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LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 288

THE UNITED STATES OF AMERICA AND THE SEC-
[illegible] OF COMMERCE, AS SUCCESSOR OF THE
[illegible] UNITED STATES MARITIME

[illegible] DEC.

[illegible] OF

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1 DOCKET NO. 870-R

CALIFORNIA EASTERN LINE, INC., PETITIONER,

v.

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, RESPONDENT

APPEARANCES:

For Petitioner: Cletus Keating, Esq., Harold B. Finn, Esq., Robert E. Kline, Jr., Esq.
For Respondent: Frederick N. Curley, Esq.

DOCKET ENTRIES

1949

June 20. Petition received and filed. Petitioner notified. Fee paid.
June 20. Request for hearing in New York, New York filed by petitioner. 6/29/49 Granted.
June 22. Copy of petition served on respondent.
August 10. Answer filed by respondent.
August 17. Copy of answer served on petitioner, New York, New York.

1950

February 1. Motion for a severance of issues filed by petitioner.
February 6. Hearing set March 1, 1950 on petitioner's motion.
March 1. Hearing had before Judge Disney, on petitioner's motion for severance of issues. Continued.
March 1. Order of continuance to April 12, 1950, on petitioner's motion for severance of issues, entered.
March 17. Transcript of hearing March 1, 1950 filed.
April 12. Hearing had before Judge Kern, on petitioner's motion for severance of issues. Granted.
April 12. Order, that petitioner's motion is granted, proceeding placed on Washington, D. C. calendar for hearing in due course, entered. 4/14/50 Copy served.
November 20. Motion for leave to file amended answer, amended answer lodged, filed by respondent. 11/22/50 Granted. 11/28/50 Copy served.

1951

January 12. Hearing set March 12, 1951, Washington, D. C.

March 16. Motion for leave to file brief as Amicus Curiae by Viking Corporation filed. Granted only as to leave to file brief.

March 16. Hearing had before Judge Raum, on merits. Motions to file brief Amicus Curiae, oral respondent's and petitioner's motion to keep record open for 10 days for receipt of documents, filed. Motions granted. Stipulation of facts with exhibits 1 thru 78 filed. Petitioner's brief due April 16, 1951. Respondent's brief due May 16, 1951. Petitioner's reply due June 15, 1951.

March 26. Respondent's memorandum in support of admissibility of exhibits G and H filed.

March 26. Brief in opposition to the admission in evidence of certain documents offered by respondent, filed by petitioner. 3/27/51 Copy served.

2 March 30. Reply to respondent's memorandum in support of exhibits G and H filed by petitioner. 4/2/51 Copy served.

March 30. Respondent's memorandum in rebuttal to petitioner's brief in opposition, filed.

March 30. Transcript of hearing March 16, 1951 filed.

April 11. Motion for leave to file a brief Amicus Curiae by American Foreign Steamship Corporation filed by Thomas J. Beddow. 4/12/51 Granted.

April 16. Brief of Viking Corporation as Amicus Curiae filed by Henry M. Marx, et al. Copy served.

April 16. Brief of American Foreign Steamship Corporation, as Amicus Curiae on question of Statute of Limitations filed by Thomas J. Beddow. 4/17/51 Copy served.

April 16. Brief filed by taxpayer. 4/17/51 Copy served.

May 16. Motion for extension to May 25/51 to file brief, filed by respondent. Granted.

May 25. Brief filed by respondent. Served 5/28/51.

June 11. Motion for leave to file printed brief in lieu of typewritten brief filed by respondent. 6/13/51 Granted.

June 22. Motion for extension to July 9, 1951 to file reply brief filed by petitioner. 6/22/51 Granted. 6/25/51 Copy served.

July 2. Reply brief of American Foreign Steamship Corporation as Amicus Curiae, on question of Statute of Limitations filed by Thomas J. Beddow and Maurice Finkelstein. 7/5/51 Copy served.

July 6. Motion for extension to 7/16/51 to file reply brief filed by taxpayer. Granted.

July 9. Reply brief of Viking Corporation, Amicus Curiae filed by Henry M. Marx, et al. Copy served.

July 16. Reply brief filed by petitioner. Served.

1952

February 1. Order that petitioner's objections to exhibits D, E and F are overruled, and exhibits D, E and F are admitted in evidence; order further that petitioner's objections to exhibits G and H are sustained, and exhibits G and H are not admitted in evidence, order further that exhibits 81, 82 and 83 are admitted in evidence, entered.

February 13. Respondent's exception to Court's order of 2/1/52 which sustained petitioner's objections to the admission in evidence of respondent's exhibits G and H, filed.

February 15. Findings of fact and opinion rendered, Raum, Judge. Decision will be entered for petitioner. Copy served 2/15/52.

February 26. Decision entered, Judge, Raum, Div. 11.

March 14. Motion for an extension of fourteen days to April 2, 1952 to file motion to vacate decision, receive further evidence and reconsider on basis of additional evidence, filed by respondent.

3 April 25. Petition for review by U. S. Court of Appeals for the District of Columbia, with assignments of error filed by Chairman of the U. S. Maritime Commission.

April 25. Certificate of service by mail filed.

April 30. Designation of record filed by Chairman of U. S. Maritime Commission.

April 30. Certificate of service by mail filed.

May 6. Motion for transmission of original exhibits to the U. S. Court of Appeals for the District of Columbia, filed by respondent.

May 7. Designation of additional portions of record on appeal, filed by U. S. Maritime Commission with proof of service thereon.

May 12. Order for transmission of all original exhibits received in evidence, consisting of exhibits 1 thru 78, attached to stipulation of facts, petitioner's exhibits 79, 80, and respondent's exhibits A thru H, inclusive, to be held in this Court until 10 days prior to hearing, entered.

4 THE TAX COURT OF THE UNITED STATES

Docket No. 870-R

CALIFORNIA EASTERN LINE, INC., PETITIONER,

v.

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, RESPONDENT

PETITION

The above-named petitioner, proceeding under Section 403 (c) (2) of the Renegotiation Act, hereby petitions for a redetermination of the alleged excessive profits set forth by the Chairman of the United States Maritime Commission in his order determining excessive profits dated March 31, 1949, Order No. 172, and as a basis of its proceeding alleges as follows:

1. Petitioner is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal office and place of business at No. 1010 Washington Street, Vancouver, Washington. Effective as of March 16, 1942, petitioner acquired all the assets and assumed all the liabilities of "California Eastern Line, Inc.," an Oregon corporation, and became the lawful successor to said Oregon corporation. Therefore, for the purposes of this petition, the term "petitioner" means the Oregon corporation as to all events occurring on or before March 15, 1942, and the Delaware corporation as to all events
5 occurring on or after March 16, 1942.

2. Petitioner is aggrieved by a determination of the Chairman made after the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which determination is not embodied in an agreement with the petitioner. The order determining excessive profits, a copy of which is attached hereto and marked Exhibit A, is dated March 31, 1949. It was issued, entered, and mailed to petitioner on that date.

3. (a) In said order the Chairman determined that $164,000 of the profits derived by the petitioner from the specific contract described therein was excessive within the meaning of the Renegotiation Act, and that the "completion" of said contract, dated May 29, 1941, occurred in the petitioner's fiscal year ended December 31, 1942. The validity

of said order and the whole amount of the alleged excessive profits set forth therein are in controversy.

(b) The Chairman's determination of excessive profits was made on the basis of a specific contract, dated May 29, 1941, between the petitioner, as owner of the American steamship "Vermont," and the British Ministry of War Transport, an agency of the British Government, as charterers thereof. Petitioner's obligations under said contract were fully performed and completed during the period between May 29, 1941, and August 8, 1941, within and prior to the close of petitioner's fiscal year 1941, which ended December 31, 1941.

6 4. Petitioner alleges that the following errors were committed by the Chairman in making his determination of alleged excessive profits, as set forth in said order:

(a) In determining said alleged excessive profits, the Chairman erroneously found and determined that the aforesaid private contract, dated May 29, 1941, between the petitioner and the British Ministry of War Transport, was a contract with a "Department," as defined in Section 403 (a) of the Renegotiation Act;

(b) In determining said alleged excessive profits, the Chairman erroneously found and determined that the profits realized by petitioner from said contract were profits realized from a contract with such a Department, within the meaning of Section 403 (c) (1) of the Renegotiation Act;

(c) In determining said alleged excessive profits, the Chairman erroneously found and determined that the renegotiation proceeding referred to in said order was "duly commenced" on November 27, 1943, "pursuant to due authority," with respect to profits realized by the contractor (petitioner) "under a contract with the Departments, as defined in the Renegotiation Act";

(d) In determining said alleged excessive profits, the Chairman erroneously found and determined that the "completion" of said contract, within the meaning of the Renegotiation Act, occurred in the contractor's (petitioner's) fiscal year ended December 31, 1942;

(e) In determining said alleged excessive profits, the Chairman erroneously found and determined that $164,000 represents the portion of the contractor's (petitioner's) profits derived from said contract which is excessive within the meaning of the Renegotiation Act;

7

(f) In determining said alleged excessive profits, the Chairman erroneously found and determined that he was authorized and directed by said Renegotiation Act to issue and enter said order dated March 31, 1949 (Exhibit A);

(g) In determining said alleged excessive profits, the Chairman erroneously *failed* to find and determine that the aforesaid private contract dated May 29, 1941, between the petitioner and the British Ministry of War Transport, was not a contract with any "Department," as defined in Section 403 (a) of the Renegotiation Act;

(h) In determining said alleged excessive profits, the Chairman erroneously *failed* to find and determine that the profits realized by petitioner thereunder were not profits realized from a contract with any such Department, within the meaning of Section 403 (c) (1) of said Act;

(i) In determining said alleged excessive profits, the Chairman erroneously *failed* to find and determine that said renegotiation proceeding, including all subsequent action taken thereunder and pursuant thereto, was null and void, *ab initio;*

(j) In determining said alleged excessive profits, the Chairman erroneously *failed* to find and determine that, even if said contract were a contract with such a Department, as defined in the Renegotiation Act, which petitioner denies, said contract was exempt from renegotiation because (i) the "final payment" pursuant to said
8 contract, within the meaning of Section 403 (c) (6) of said Act, was made prior to April 28, 1942, and, (ii) the aforesaid renegotiation proceeding, which was commenced on November 27, 1943, was not commenced within one year after the close of the fiscal year of the contractor (petitioner) within which "completion" of said contract occurred, within the meaning of said Act;

(k) In determining said alleged excessive profits, the Chairman erroneously *failed* to find and determine that, even if said contract were a contract with such a Department, as defined in the Renegotiation Act, which petitioner denies, no portion of the profits realized by petitioner thereunder was excessive, within the meaning of the Renegotiation Act;

(l) In determining said alleged excessive profits, the Chairman erroneously *failed* to find and determine that he was without authority to enter any order in respect to said renegotiation proceeding, except an order dismissing the proceeding for want of jurisdiction.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(a) Petitioner is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business at No. 1010 Washington Street, Vancouver, Washington. Effective as of March 16, 1942, petitioner acquired all the assets and assumed all the liabilities of "California Eastern Line, Inc.," an Oregon corporation, and became the lawful successor to said Oregon corporation. Therefore, for the purposes of this petition, the term "petitioner" means the Oregon corporation as to all events occurring on or before March 15, 1942, and the Delaware corporation as to all events occurring on or after March 16, 1942.

9

(b) On May 29, 1941, petitioner, as owner of the American steamship "*Vermont*", entered into a written contract (designated therein and hereinafter referred to as a "charter") with the British Ministry of War Transport, an agency of the British Government and an alien within the meaning of the Shipping Act, 1916, as amended, as charterers of said vessel. Under the terms of said charter it was mutually agreed that said steamship would load, at not more than two United States Atlantic coast ports, a cargo of lawful merchandise, which said charterers agreed to furnish, and being so loaded would therewith proceed as ordered to not exceeding two ports of discharge in the Gulf of Aden and the Red Sea range not beyond Suez, and there deliver the cargo at such wharf, dock, or other place as charterers' agents might direct on arrival, in consideration whereof said charterers agreed to pay the vessel freight as set forth in said charter, the entire freight to be prepaid, without discount, and to be considered as earned and not returnable, vessel and/or cargo lost or not lost. Said charter was executed for and on behalf of the petitioner and said British Ministry of War Transport by their duly authorized representatives. A copy of said charter is attached hereto and marked Exhibit B.

(c) Said charter was not a contract with any "Department" of the United States, as defined in Section 403 (a) of the Renegotiation Act, nor was it executed for or on behalf of any such Department. On the contrary, said charter was formally approved by the Maritime Commission as and for a charter of an American-owned vessel to a person "not a citizen of the United

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States" within the meaning of Sections 9 and 37 of the Shipping Act, 1916, as amended.

(d) On May 29, 1941, said steamship "*Vermont*," having loaded the cargo which charterers furnished at the port of New York, sailed from that port and proceeded as ordered by charterers to Port Sudan, a port in the Red Sea range, and there delivered said cargo as directed by charterers' agents. The final delivery of said cargo was made at Port Sudan, on August 8, 1941, and by such delivery petitioner fully completed the performance of its obligations under said charter, within and prior to the close of petitioner's fiscal year 1941, which ended December 31, 1941.

(e) In the meantime, on June 24, 1941, while said vessel was en route to Port Sudan, petitioner received full and final payment of the agreed freight, payable under the terms of said charter by the British Ministry of War Transport, to wit, the sum of $336,577. Said freight was paid to petitioner by the Maritime Commission, for and on behalf of said British Ministry of War Transport, pursuant to a certain inter-governmental "arrangement", dated June 9, 1941, between the Office for Emergency Management, an agency of the United States Government, and the British Merchant Shipping Mission, another agency of the British Government. Petitioner was not a party to said intergovernmental arrangement, nor was it consulted by either Government as to the terms and conditions thereof. Petitioner is informed and verily believes, and therefore
11 alleges on information and belief, that the full amount of said freight paid to petitioner by the Maritime Commission, pursuant to the aforesaid intergovernmental arrangement, was drawn from funds appropriated by Congress for the use and benefit of the British Government, pursuant to and under the provisions of the so-called "Lend-Lease Agreement" between said Governments; and the United States was credited with the full amount of said payment in the final adjustment and settlement of the Lend-lease accounts.

(f) On April 28, 1942, the President of the United States approved the Sixth Supplemental National Defense Appropriation Act, 1942 (Public Law 528, 77th Congress), which included, as Section 403 thereof, the so-called "Renegotiation Act of 1942." Under the provisions of said Act, both in its original form and as subsequently amended, the Secretaries of certain Departments of the United States

Government, including the Chairman of the Maritime Commission, were authorized and directed to renegotiate the contract price of, and eliminate any excessive profits realized by contractors from, contracts with such Departments, subject to specified exceptions and exemptions as set forth in said Act. The term "Department," as defined in Section 403 (a) of said Act, did not include the British Ministry of War Transport, and said Act did not grant authority to any person to renegotiate any contract made between citizens of the United States and said British Ministry of War Transport.

(g) Section 403 (c) (6) provides, among other things, that:

> "This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made [with any of the Departments mentioned in Section 403 (a)], whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless
>
> "(i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942;"

The "final payment," pursuant to the aforesaid contract with the British Ministry of War Transport, within the meaning of the Renegotiation Act itself, and as said Act was construed by the War, Navy, and Treasury Departments, and the Maritime Commission, in a "Joint Statement" dated and issued March 31, 1943, was made prior to April 28, 1942, and, even if said Renegotiation Act were applicable to said contract, which petitioner denies, said contract was wholly exempt from renegotiation under the provisions of said Renegotiation Act.

(h) Said Section 403(c)(6) further provided that:

> "No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary [Chairman] more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary [Chairman], occurs."

Within the meaning of said Renegotiation Act, the "completion" of said contract occurred within and prior to the close of petitioner's fiscal year, which ended December 31, 1941, and, even if said Renegotiation Act were applicable

to said contract, which petitioner denies, no renegotiation thereof could be lawfully commenced by the Chairman more than one year after December 31, 1941. Therefore, the purported renegotiation proceeding referred to in the Chairman's order of March 31, 1949, which was not commenced until November 27, 1943, was null and void, *ab initio*.

(i) On or about August 3, 1942, petitioner received payment of "demurrage" in the amount of $14,700, and, on or about October 15, 1942, reimbursement for overtime paid to the crew of said vessel in the amount of $295.78, both of which amounts were also payable under the terms of said charter by the British Ministry of War Transport. Each of said payments was made by the Maritime Commission, for and on behalf of said British Ministry of War Transport, pursuant to the aforesaid inter-governmental "arrangement" dated June 9, 1941. Neither of said payments, however, constituted the "final payment" pursuant to the aforesaid contract, within the meaning of the Renegotiation Act itself, nor within the meaning of said term as construed by the Departments in said "Joint Statment" dated and issued March 31, 1943.

(j) Nevertheless, on November 29, 1943, more than one year after the close of petitioner's fiscal year 1941, which ended on December 31, 1941, petitioner received a letter from the Maritime Commission, dated November 27, 1943, signed "John R. Paull, Price Adjustment Board," and captioned: "Subject: *Notice of Initial Conference under the Renegotiation Act which shall constitute Commencement of Renegotiation,*" in which petitioner was notified that a Price Adjustment Board had been established in the Maritime Commission, pursuant to the Renegotiation Act, and that the renegotiation for petitioner had been assigned to the Commission's Price Adjustment Board. Petitioner was also notified in said letter that "an initial conference" with said Price Adjustment Board had been set for December 20, 1943, at which time petitioner was requested to furnish the Board with certain information and financial data pertaining to the aforesaid charter with the British Ministry of War Transport.

(k) On December 9, 1943, by a letter bearing that date, petitioner notified said Board that its position was, and would continue to be, a denial that the Renegotiation Act contemplates or has any legal relation or application to said charter. Petitioner has continuously maintained that posi-

tion throughout the purported renegotiation proceeding referred to in the Chairman's order of March 31, 1949.

(l) The proposed "initial conference" was not held on December 20, 1943, as scheduled, but was adjourned by mutual agreement to February 1, 1944, and from time to time thereafter until January 24, 1945, at which time petitioner restated its position, as aforesaid, and demanded that the Board discontinue its attempts to renegotiate said charter with the British Ministry of War Transport. The Board, however, refused to discontinue the proceeding and, on the contrary, stated that it would proceed with the renegotiation proceeding and, if necessary, enter a unilateral order with respect to the excessive profits, if any, realize by petitioner from said charter. From time to time thereafter, the Board demanded additional information and financial data from petitioner, which was furnished under protest and without prejudice to petitioner's position in the matter. Although the Board made several attempts to reach an agreement with the petitioner in respect to the amount of the excessive profits said by the Board to have been realized by petitioner under said charter, petitioner refused to enter into any such agreement.

(m) On March 31, 1949, without notice to the petitioner, Admiral W. W. Smith, as Chairman of the Maritime Commission, issued and entered the aforesaid order determining excessive profits, dated March 31, 1949, designated as Order No. 172. By said order, as hereinabove alleged, said Chairman found and determined that the aforesaid renegotiation proceeding was "duly commenced pursuant to due authority" with respect to profits realized by the contractor (petitioner) under a contract with the Departments, as defined in the Renegotiation Act, for the transportation of merchandise and other cargo to ports on the Red Sea; that the "completion" of said charter occurred in the contractor's fiscal year ended December 31, 1942; and that, as a result of such renegotiation, he determined that the sum of $164,000 represents the portion of the contractor's (petitioner's) profits derived from said contract which is excessive within the meaning of the Renegotiation Act.

(n) On March 31, 1949, said John R. Paull, as Chairman of the Maritime Commission Price Adjustment Board, acting on behalf of the Chairman of the Maritime Commission, forwarded to petitioner a copy of said Order No. 172, dated March 31, 1949, and demanded payment of the amount of

the alleged excessive profits, less the tax credit, if any, referred to in said order; and, on the same day, said John R. Paull requested and caused the Commission's Bureau
16 of Accounts to issue an order stopping all further payments of amounts otherwise due petitioner from the Maritime Commission.

(o) On May 31, 1949, under protest and with full reservation of all its legal rights, petitioner caused to be forwarded to said John R. Paull its certified check payable to the order of the Treasurer of the United States in the amount of $54,000, dated May 27, 1949, in payment of the aforesaid amount of $164,000 less estimated Federal tax credit of $110,000, the Internal Revenue Agent in Charge, Seattle Division, having advised petitioner that he had not received from the Treasury Department the documents which he requires to determine the exact amount of the Federal tax credit.

(p) Petitioner alleges, on information and belief, that the aforesaid contract dated May 29, 1941, between petitioner and said British Ministry of War Transport, was not a contract with any Department of the United States Government, as defined in said Renegotiation Act; that the profits realized by petitioner under said contract were not profits realized from any contract with any such Department; and that the Chairman of the Maritime Commission was not authorized or directed by said Renegotiation Act to renegotiate the contract price set forth in said contract or to eliminate the excessive profits, if any, derived by petitioner thereunder.

(q) Petitioner alleges, upon information and belief, that, even if said contract dated May 29, 1941, between petitioner and said British Ministry of War Transport, were a contract with a Department of the United States Government, as defined in said Renegotiation Act, which petitioner denies, said contract and the profits realized by peti-
17 tioner thereunder were expressly exempt from renegotiation because (i) the "final payment" pursuant to such contract was made prior to April 28, 1942, within the meaning of the Renegotiation Act itself, and within the meaning of said term as defined in the "Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission," dated and issued March 31, 1943, by the Secretaries of the Departments authorized to renegotiate contracts, including the Chairman of the Maritime Commission; and (ii) because the purported renegotiation proceeding, which was commenced on or

about November 27, 1943, was commenced more than one year after the close of the fiscal year of the petitioner within which "completion" of said contract occurred, within the meaning of said Renegotiation Act, to wit, more than one year after the close of petitioner's fiscal year 1941, which ended December 31, 1941.

(r) Petitioner's gross earnings under said charter, including payments received for freight and demurrage as aforesaid, were $351,277.00. The expenses paid or incurred by petitioner in the performance of said charter amounted to $154,676.35, leaving a net profit of $196,600.65, before taxes. No portion of said net profit was excessive within the meaning of said Renegotiation Act.

WHEREFORE, the petitioner prays that this Court may hear the proceeding and finally determine:

(1) That the aforesaid private contract dated May 29, 1941, between the petitioner and the British Ministry of War Transport, attached hereto and marked Exhibit B, was not a contract with any "Department," as defined in Section 403 (a) of the Renegotiation Act;

18 (2) That the profits realized by petitioner under said contract were not profits realized from a contract with any such Department, within the meaning of Section 403 (c) (1) of said Act;

(3) That the renegotiation proceeding referred to in the Chairman's order of March 31, 1949, including all subsequent action taken thereunder and pursuant thereto, was null and void, *ab initio;*

(4) That, even if said contract were a contract with such a Department, as defined in the Renegotiation Act, said contract was exempt from renegotiation because (i) the "final payment" pursuant to said contract, within the meaning of Section 403 (c) (6) of said Act, was made prior to April 28, 1942, and, (ii) the aforesaid renegotiation proceeding, which was commenced on November 27, 1943, was not commenced within one year after the close of the fiscal year of the contractor (petitioner) within which "completion" of said contract occurred, within the meaning of said Act;

(5) That, even if said contract were a contract with such a Department, as defined in the Renegotiation Act, no portion of the profits realized by petitioner thereunder was excessive, within the meaning of the Renegotiation Act;

(6) That the Chairman was without authority to enter any order with respect to such renegotiation proceeding,

except an order dismissing the proceeding for want of jurisdiction;

(7) That petitioner is entitled to a refund of the aforesaid sum of $54,000 paid to the Treasurer of the United States pursuant to the aforesaid order of the Chair-
19 man, dated March 31, 1949, and the aforesaid notice of demand and said John R. Paull, dated March 31, 1949, with interest; and

(8) That the petitioner is entitled to such other and further relief as the Court may determine.

(S.) Cletus Keating
(S.) Harold B. Finn
(S.) Robert E. Kline, Jr.,
Attorneys for Petitioner
Office and Post Office Address:
120 Broadway
New York 5, N. Y.
and
Munsey Building
Washington 4, D. C.

Of Counsel:

Kirlin, Campbell, Hickox & Keating
120 Broadway
New York 5, N. Y.

20 State of Washington,
County of Clark, ss.:

S. P. Fleming, being duly sworn, says that he is the Vice-president of California Eastern Line, Inc., the petitioner herein, and is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated upon information and belief, and that those he believes to be true.

(S.) S. P. Fleming.

Subscribed and sworn to before me this 14th day of June, 1949.

Creyton C. Malone,
Notary Public (Seal.)

21 EXHIBIT A

Order No. 172

Chairman of United States Maritime Commission
Order Determining Excessive Profits

Pursuant to due authority a renegotiation proceeding was duly commenced on November 27, 1943, with CALIFORNIA EASTERN LINE, INC., a Delaware corporation, having its principal office at 1010 Washington Street, Vancouver, Washington, (hereinafter called "the Contractor") with respect to the profits realized by the Contractor under a contract with the Departments, as defined in the Renegotiation Act, for the transportation of merchandise and other cargo to ports on the Red Sea, said contract having been entered into on or about May 29, 1941, and involving the chartering of space on the Steamship "Vermont", the completion of which contract is determined by the undersigned to have occurred in the Contractor's fiscal year ended December 31, 1942.

In connection with such renegotiation proceeding, conferences were held with the Contractor, at or in connection with which there were submitted by the Contractor and obtained from Governmental or other reliable sources certain financial, operating and other data relating to the Contractor's business and the Contractor's profits derived from said contract. At and in connection with such conferences the Contractor has been afforded full opportunity to submit such additional information and to present such contentions as the Contractor deemed material to a determination of excessive profits within the meaning of the Renegotiation Act.

In determining the excessive profits hereinafter determined, due consideration has been given to all such financial, operating and other data and information so furnished or obtained and to each of the contentions so presented
22 and to all of the factors referred to in the applicable provisions of the Renegotiation Act.

As a result of such renegotiation it is hereby determined that One hundred sixty four thousand Dollars ($164,000.00) represents the portion of the Contractor's profits derived from said contract which is excessive within the meaning of the Renegotiation Act.

The Chief of the Bureau of Finance (or such official or officials in the United States Maritime Commission to whom the power, function and duty of exercising such

authority and carrying out such direction may be or has been delegated or successively redelegated) is hereby authorized and directed to take such action (including the authorization and direction of any other Secretary or Secretaries to take such action) as is provided by the Renegotiation Act and as he deems appropriate to eliminate such excessive profits to be eliminated.

In connection with the payment or discharge by any means of such excessive profits to be eliminated the Renegotiation Act provides that the Contractor shall be allowed the applicable credit, if any, for Federal income and excess profits taxes as provided in Section 3806 of the Internal Revenue Code. Of the $164,000.00 excessive profits to be eliminated, $14,996 is, for purposes of a proper computation of the allowable tax credit under said Section 3806 of the Internal Revenue Code, allocated to the Contractor's taxable year ended December 31, 1942; and $149,004 to the Contractor's taxable year ended December 31, 1941.

(Signed) W. W. Smith,
Chairman,
United States Maritime Commission.

J. M.
Dated, Issued and Entered on March 31, 1949.

23 Exhibit B

Charter

May 29, 1941

It is this day mutually agreed between California Eastern Line, Inc. Owners of the Steamship Vermont of 3524 tons net register, classed A. 1. American Bureau now at New York and British Ministry of War Transport Charterers, as follows:

1.—That the said steamship, being tight, staunch and strong, and in every way fitted for the voyage and, according to Builders' scale and plan, which Owners believe to be correct but do not guarantee, has 412,242 cubic feet bale space available for cargo, and shall load at not more than two United States Atlantic Coast ports, north of Cape Hatteras, but not east of Portland, Maine, according to custom of port, a cargo of lawful merchandise, which Charterers shall furnish subject to Clause 25, and being so loaded shall therewith proceed as ordered when Bills of Lading are signed to not exceeding two ports of discharge in the

Gulf of Aden and the Red Sea range not beyond Suez, or so near thereunto as she may safely get, and there, always afloat, deliver the cargo as customary, at such wharf, dock or other good and safe place as Charterers' Agents may direct on arrival, in consideration whereof Charterers shall pay the vessel freight as follows:

Seventy-five cents (75¢), United States Currency, net per cu. ft., on the bale cargo capacity, as above stated. For on-deck cargo Sixty cents (60¢), United States Currency, net per cu. ft. on cubic measurement of such cargo carried.

24 Entire freight to be prepaid, without discount, and except as provided in clause 2 (Two), to be considered as earned and not returnable, vessel and/or cargo lost or not lost.

If the Charterers find it necessary to discharge at port or ports other than in the range named above then the Charterers may order the vessel to discharge at not exceeding two ports in any one of the following ranges:

Capetown-Mombasa
Persian Gulf
Karachi-Bombay

If under these circumstances vessel discharges in ranges last named, the Owners shall refund to Charterers the following sums:

(a) Port or ports in Capetown—Mombasa range—*Thirty cents (30)* per cubic foot bale space on which original freight was paid and *Twenty-four cents (24¢) per cubic foot of cubic measurement of on-deck cargo;*

(b) Port or ports in Persian Gulf *Twenty cents (20¢)* per cubic foot bale space on which original freight was paid and *Sixteen cents (16¢) per cubic foot of cubic measurement of on-deck cargo;*

(c) Port or ports in Karachi-Bombay range *Twenty-five cents (25¢)* per cubic foot bale space on which original freight was paid and *Twenty cents (20¢) per cubic foot of cubic measurement of on-deck cargo*

Vessel shall not be required to discharge in more than one range.

Confirmation of discharging ports as ordered on sailing to be given on vessel's arrival off Mombasa within 12

hours. If longer detained awaiting orders, such additional time to count as lay days.

25 2.—If by reason of changed conditions the Owners and Charterers agree, or in case of disagreement, the United States Maritime Commission determines, that the voyage shall not be prosecuted further or not completed, and the vessel is not lost and does not discharge at a port or ports, Capetown or beyond, adjustment of freight shall be made on the basis of U. S. $2,250.00 per day vessel is used by Charterer.

3.—Steamer to have liberty to sail with or without pilots, and to tow and assist vessels in all situations. Steamer to have liberty to call at any port or ports en route, or not, for fuel, and/or supplies.

4.—Charterers to have the privilege of designating wharves, or other good and safe places for loading or discharging. The cargo to be brought to, and taken from alongside the Steamer, at Charterers' risk and expense, any custom of the port to the contrary notwithstanding. Lighterage, if any, at discharging port for the account of the cargo. Steamer to supply steam to drive winches, and to give use of gear on board vessel, also to load or discharge at night, on Sundays or holidays or on day when notice is given if required by Charterers. Charterers to pay all expenses and labor incurred on cargo, including overtime to crew for cargo working purposes.

5.—Charterers are to load, stow, and trim the cargo at their own expense, under the direction of the Master. Charterers to pay all port charges incidental to the outward cargo at loading port or ports, including elevating, stevedore, tallying, watching, clerking, top wharfage, and to provide and fill sacks required to secure bulk grain, also all necessary shifting boards, dunnage and dunnage mats, if required, but Owners to pay all other charges at loading port.

6.—Charterers' Agents to pay cost of discharging cargo, and all port charges incidental to the cargo at the discharging port or ports to which steamer may be

26 ordered, but the Owners to pay all other charges at the discharging port or ports.

7.—Charterers to have use of any dunnage or mats, etc., as may be aboard.

8.—The Steamer shall be consigned to Charterer's Agents at ports of loading and discharge, and shall employ their Broker to attend to the Ship's business.

9.—The Charterer's Agents shall sign Bills of Lading

in behalf of the Master as and when presented, without prejudice to this charter-party. The captain, officers and crew of the vessel in supervising loading, stowing, trimming, tallying and discharge of cargo shall be deemed the agents of the Charterers, except in so far as such supervision pertains to the safety of the vessel. Except as otherwise provided in this Charter, neither the vessel nor the Owner shall be liable for shortage, damage, breakage, leakage, shrinkage or any other condition in respect to cargo arising without the actual fault and privity of the Owner and without the fault or neglect of Agents or servants of the Owner.

10.—Lay days at port or ports of loading to commence on the day following receipt by Charterer's Agents of Captain's written notice of readiness whether vessel is in berth or not. Should the Steamer not be ready to load on or before noon of ....., the Charterers have the option of cancelling this charter-party. Lay days at port or ports of discharge to commence on the day following receipt by Charterer's Agents of Captain's written notice of readiness whether vessel is in berth or not.

11.—If the Steamer be not sooner dispatched cargo to be loaded and discharged in a total of ten (10) running days. Should the cargo not be loaded at loading port or discharged at port of destination within the specified time, for each and every day over and above said lay days, Charterers are to pay, day by day, the sum of Twenty
27 two hundred fifty ($2250.00) Dollars, United States Currency, per day demurrage, any detention through Quarantine to Vessel not to count in lay days. Lay days allowed for loading and discharging are reversible. Lay days not to include time steaming between ports.

12.—The clauses herein regarding payment of port charges, stevedores, etc., at ports of loading and discharge refer only to such charges as are ordinarily incurred, any extra expenses caused by the steamer being under average, are to be adjusted in the usual way. All spaces to be placed at Charterers' disposal, which would be used for cargo, if loading for Owner's account, and where cargo has been carried before.

13.—Throughout this charter-party the following are always mutually excepted: The act of God; perils or accidents of the sea; causes beyond the shipowners or Charterers control; restraint or interference or compliance with any directions whatsoever by any Government; fire

from any cause whatsoever or wheresoever occurring, unless caused by the actual fault or privity of the Owners or Charterers, as the case may be; war, hostilities, rebellion or civil commotion even though existing or anticipated when this charter is made or any bills of lading signed or voyage commenced hereunder; enemies, pirates, riots, strikes, lockouts, stoppage, shortage or lack of labor or labor troubles of the shipowner's employees or others; fault or error in the management or navigation of the vessel; unseaworthiness, latent or other defect even though existing at delivery or beginning of any voyage not resulting, however, from Owner's want of due diligence. Notwithstanding anything to the contrary in this charter-party, the Owner shall be entitled to any exemptions from or limitations of liability afforded by any statute or rule of law for the time being in effect.

14.—Owners shall furnish Charterers with a copy of Vessel's scale and plan showing cubic capacities of all holds and spaces upon signing of this charter-party.

28 15.—The bale capacity of 412,242 cubic feet according to builder's plan excludes deep tank with a total bale capacity of 25,000 cubic feet. Freight is not payable on the deep tank space unless cleaned, fitted, and in every way made usable for cargo by Owners.

16.—This charter-party includes, and all bills of lading issued hereunder shall include, subject to clause 1 of this charter, Chamber of Shipping War Clauses 1/2/3/ August 1937:—

War Risks Clause

"1. The Master shall not be required or bound to proceed to any blockaded port or for any port which the Master or Owners in his or their discretion consider dangerous or impossible to enter or reach nor to sign bills of lading for any such port.

"2. (A) If any port of discharge named in this charter-party or to which the vessel may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or

"(B) If owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law (a) entry to any such port or discharge of cargo intended for any such port be considered by the Master or Owners in his or their discretion dangerous or prohibited or (b) it be considered by the Master or Owners in his or their discre-

tion dangerous or impossible for the vessel to reach such discharging port—the cargo or such part of it as may be affected shall be discharged at any other safe port in the vicinity of the said port of discharge as may be ordered by the Charterers (provided such other port is not blockaded or that entry thereto or discharge of cargo thereat is not in the Master's or Owners' discretion dangerous or prohibited). If no such
29 orders be received from the Charterers within forty-eight (48) hours after they or their agents have received from the Owners a request for the nomination of a substitute discharging port, the Owners shall then be at liberty to discharge the cargo at any safe port which they or the Master may in their or his discretion decide on and such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment so far as cargo so discharged is concerned. In the event of cargo being discharged at any such other port the Owners shall be entitled to freight as if the discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses.

"3. The vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destination, zones, waters, delivery or in any other wise whatsoever given by the government of the nation under whose flag the vessel sails or any other government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation.

30 "If by reason of or in compliance with any such direction or recommendation the vessel does not proceed to the port or ports originally designated or to which she may have been ordered pursuant to the

terms of the Bills of Lading, the vessel may proceed to any safe port which the Master or Owners in his or their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment and the Owners shall be entitled to freight as if discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses."

17.—This charter-party includes, and all bills of lading issued hereunder shall include the New Jason Clause, reading:—

"In the event of accident, danger, damage or disaster before or after commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods."

General average, if any, to be according to York-Antwerp Rules, 1924, Rule F, 1/15 inclusive and 17/22 inclu-
31 sive, Owners shall be entitled to appoint General Average adjusters.

18.—This charter-party includes, and all bills of lading issued hereunder shall include the Both-to-Blame Collision Clause reading:—

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-

carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier."

19.—All bills of lading issued hereunder shall include the Clause Paramount reading:—

Carriage of Goods by Sea Act of 1936

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

32 20.—A regular line bill of lading on booking agents' form to be used and all such bills of lading covering Charterer's cargo to be clausedas follows: "All terms and conditions and exceptions of charter-party dated New York, May 29, 1941, are hereby incorporated." This clause will not appear on bills of lading for commercial cargo, but Charterer's Agents to cover the Owner's liability with separate P & I. coverage.

21.—Charterers to comply with all Government regulations relating to loading, stowage and discharge of dangerous cargo.

22.—Charterers shall be responsible for fulfilment of all requirements of Neutrality Act 1939 of the United States including any amendments thereof and all proclamations, rules and regulations thereunder so far as they relate to cargo.

23.—On-deck cargo to be carried at sole discretion of Master and at the risk of Charterers and/or Owners of such cargo.

24.—The freight to be paid under this charter is predicated on obtaining war risk insurance at a rate of 5% into the Red Sea on a valuation of Eight hundred thousand ($800,000.00) Dollars. Any increase in this war risk insurance rate into the Red Sea to be added to the total freight, and any reduction to be deducted.

25.—Charterer has the privilege of securing commercial or other lawful cargo to complete ship, or fill broken stow-

age space, to insure charterers securing maximum use of ship's capacity. The revenue on such cargo, less cargo handling expenses, P&I insurance premiums to cover B/L risk, deduction for cargo claims, brokerage if any and a commission of 5% to the booking agent (named in clause 8) to be credited to the Charterer.

26.—Vessel to be berthed in United States ports at piers or terminals and to use facilities designated by the
33 Charterer and approved by an authorized representative of the United States Maritime Commission. Consideration will be given to the use of Owner's terminals and facilities where practical.

27.—Charterers have privilege of appointing booking or loading agents in the United States approved by the United States Maritime Commission, but Owners not required to pay for this service in excess of one-fourth cent (¼¢) per bale cubic as above, subject to a maximum of One Thousand Dollars ($1,000). Charterer's Agents to be used at discharge ports and for which agency fees will be allowed in an amount not exceeding one hundred and twenty-five dollars ($125) for each port.

28.—This charter not to become effective until approved by the United States Maritime Commission. If any dispute arises under this charter the same is to be settled by the United States Maritime Commission.

California Eastern Line, Inc.,
By: R. A. Nicol,
President.

British Ministry of War Transport,
By: T. A. Sparks,
Representative in the U. S. A.

Approved
United States Maritime Commission,
By: G. H. Helmbold,
Director, Operations and Traffic.

[CAPTION]

42 MOTION FOR A SEVERANCE OF ISSUES

Now comes the petitioner, by its attorneys, and moves that the Court sever and decide in the first instance, apart from any other issue raised by the pleadings, the basic issue of whether, as determined below by respondent in his Order Determining Excessive Profits, dated March 31, 1949, the specific contract referred to in said order and on which said order was based is a contract covered by the Renegotiation Act and subject to renegotiation by the Chairman of the Maritime Commission under authority of said Act. In support of its motion petitioner respectfully shows to the Court as follows:

1. This is a proceeding filed under authority of Section 403 (e) (2) of the Renegotiation Act, as amended, for a redetermination of alleged excessive profits, determined by respondent in his Order Determining Excessive Profits,
43 dated March 31, 1949, to have been derived by petitioner from a specific contract dated May 29, 1941, between petitioner, as owner of the American steamship "*Vermont*," and the British Ministry of War Transport, a department or agency of the British Government, as charterer of said vessel, for the transportation by water of merchandise and other cargo from the United States to ports of discharge in the Gulf of Aden/Red Sea range. Copies of respondent's said order and of the specific contract referred to therein are annexed to the petition herein as *Exhibit A* and *Exhibit B*, respectively. Respondent's answer admits that said exhibits are true copies of said documents.

2. Despite the fact that said specific contract is patently an agreement in writing made by California Eastern Line, Inc., the petitioner herein, as owner of the "*Vermont*," with the British Ministry of War Transport, a department or agency of the British Government, as charterers of said vessel, the respondent has found and determined, in his said order, that:

> "Pursuant to due authority a renegotiation proceeding was duly commenced on November 27, 1943, with

> California Eastern Line, Inc., a Delaware corporation, having its principal office at 1010 Washington Street, Vancouver, Washington, (hereinafter called 'the Contractor') with respect to the profits realized by the Contractor under a contract with the Departments, as defined in the Renegotiation Act, for the transportation of merchandise and other cargo to ports on the Red Sea, said contract having been entered into on or about May 29, 1941, and involving the chartering of space on the Steamship '*Vermont*,' the completion of which contract is determined by the undersigned to have occurred in the Contractor's fiscal year ended December 31, 1942."

and further that:

> "As a result of such renegotiation it is hereby determined that One hundred sixty four thousand Dollars ($164,000.00) represents the portion of the Contractor's profits derived from said contract which is excessive within the meaning of the Renegotiation Act."

Respondent's said order, it should be noted, fails to indicate any basis for his finding and determination that a contract made by a private corporation with a department or agency of a foreign sovereign is "a contract with the Departments [of the United States], as defined in the Renegotiation Act"; and it is perhaps significant that the order fails to identify the "Departments" with which the contract was made, as determined by respondent.

3. The renegotiation proceeding referred to in respondent's said order, commenced on November 29, 1943, by a Notice of Initial Conference, was commenced, maintained and concluded below over the repeated objections of petitioner, both oral and in writing, that said contract was not a contract with any "Department" of the United States, as defined in the Renegotiation Act; that the purported renegotiation proceeding was null and void *ab initio;* and that it should be discontinued. Said objections were overruled, however, and the proceedings were finally concluded below by the entry of said order.

4. In this proceeding, commenced by the filing of a petition under authority of Section 403 (e) (2) of the
45 Renegotiation Act, as amended, petitioner appeals to this Court for a redetermination of the alleged excessive profits as set forth in respondent's order of March 31, 1949, not only in respect to the amount thereof, but more particualrly in respect to the basic question of coverage, i. e., whether the specific contract referred to in said order was covered by and subject to the Renegotiation Act. Specifically, petitioner prays in its petition that this Court may hear the proceeding and finally determine, among other things:

> "(1) That the aforesaid private contract dated May 29, 1941, between the petitioner and the British Ministry of War Transport, attached hereto and marked Exhibit B, was not a contract with any 'Department,' as defined in Section 403 (a) of the Renegotiation Act;
>
> "(2) That the profits realized by petitioner under said contract were not profits realized from a contract with any such Department, within the meaning of Section 403 (c) (1) of said Act;
>
> "(3) That the renegotiation proceeding referred to in the Chairman's order of March 31, 1949, including all subsequent action taken thereunder and pursuant thereto, was null and void, *ab initio*."

5. On or about July 24, 1945, during the course of said renegotiation proceeding, petitioner sought to obtain a judicial decision on the question of coverage by filing a complaint for a declaratory judgment and injunction in the District Court of the United States for the District of Columbia, Civil Action No. 29936, but this complaint was voluntarily withdrawn on May 21, 1946, following the decision of the Supreme Court in *Macauley* vs.
46 *Waterman Steamship Corporation* (1946) 327 U. S. 540, 544, wherein it was held in respect to a similar contract that:

> "The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination

of excessive profits may have them redetermined in a 'de novo' proceeding before the Tax Court. Section 403 (c) (1) of the Act provides that the Tax Court 'shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits. . . .' Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act. In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the *Myers* case, the administrative process, far from being exhausted, had hardly begun. The District Court conse-
47 quently was correct in holding that it lacked jurisdiction to act."

6. As a matter of law, therefore, it has been definitely settled that this Court has exclusive jurisdiction to determine in the first instance whether the contract involved in this proceeding is covered by and subject to the Renegotiation Act; and this question of coverage is obviously the basic issue in the proceeding, and may well prove to be the controlling issue.

7. Moreover, this same question of coverage is also the basic isue in about fifteen (15) other renegotiation proceedings now pending in respect to other shipowners who, like the petitioner, entered into similar contracts with the British Ministry of War Transport for voyages to the Red Sea. In all, some seventy (70) voyages were made to the Gulf of Aden/Red Sea range by American flag vessels pursuant to contracts with the British Ministry of War

Transport, and in each instance the contract was substantially identical to the one involved herein. Likewise, in each instance, the Price Adjustment Board of the Maritime Commission determined that the contracts involved were contracts with a "Department" of the United States, as defined in the Renegotiation Act, and commenced renegotiation proceedings with respect to the profits derived therefrom.

8. Four of said other renegotiation proceedings have already advanced to the point where unilateral orders determining excessive profits have been entered by respondent, all of which include a determination that the contract or contracts involved were contracts with a "Department" of the United States subject to renegotiation by the Chairman of the Maritime Commission; and in those four cases petitions for redetermination have been filed and are now pending in this Court, as listed below.* Petitioner is reliably informed, moreover, that petitions for redetermination will also be filed in respect to most of the remaining cases as soon as unilateral orders are entered therein.

48

9. Thus, the basic question of whether these so-called Red Sea charters made by some fifteen American shipowners with the British Ministry of War Transport, all in the same form as the contract involved herein, were contracts with a "Department" of the United States, as defined in the Renegotiation Act, is now before the Court in five proceedings for redeterminations of alleged excessive profits; and it is probable that some ten other petitions will soon be filed by other shipowners for a redetermination of the same basic question. Since, as the Supreme Court stated in *Macauley* vs. *Waterman Steamship Corporation, supra*, a decision as to what are and are not renegotiable

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* Docket No. 871-R—*Pacific-Atlantic Steamship Co.* vs. *Chairman of the U. S. Maritime Commission.*

Docket No. 872-R—*States Steamship Company* vs. *Chairman of the U. S. Maritime Commission.*

Docket No. 873-R—*Pope & Talbot, Inc.*, vs. *Chairman of the U. S. Maritime Commission.*

Docket No. 883-R—*Christenson Steamship Co.* vs. *Chairman of the U. S. Maritime Commission.*

contracts is an essential part in determining the amount of a contractor's excessive profits, within the meaning of the Renegotiation Act, it is clear that the Court, sooner or later, will be obliged to consider and decide this basic question. Petitioner believes and respectfully suggests to the Court that this basic question of coverage should be
49 considered and determined now, rather than later, because a preliminary determination of the question would undoubtedly result in a substantial saving of time and expense to all concerned, including the Court itself, whether the decision be favorable or unfavorable to the petitioner.

10. If this motion is granted and the Court determines that the contracts with the British Ministry of War Transport were not contracts with any "Department" of the United States, as defined in the Renegotiation Act, and not subject to renegotiation by the Chairman of the Maritime Commission, as determined below, this proceeding and all other pending proceedings involving the same form of contract could be terminated forthwith, without considering the complex question of alleged excessive profits. If, on the other hand, the Court determines that such contracts were subject to renegotiation, its decision would settle the primary and basic issue in this proceeding and establish a controlling precedent for the other proceedings. In either event, once the question is decided by this Court, it will be unnecessary for the Court to consider it again either in this or in any subsequent case.

11. If, however, this motion is denied and a decision on the question of coverage is deferred until the parties are ready to submit their cases for a final determination on all issues, including the complex issue of whether the petitioner actually derived excessive profits from the contract, both parties will be obliged to expend considerable time and substantial sums of money in preparing for trial. For example, as the Court will readily appreciate, the question of what are or are not excessive profits under
50 a specific contract in a specialized industry such as the shipping industry is a difficult and complex question requiring the use of expert witnesses such as traffic experts, appraisers, accountants and others familiar with steamship management and operation; and in this case some of petitioner's essential witnesses are residents of the West Coast. The same situation exists generally in the

other pending cases, which will also have to be prepared for trial unless a final determination of the coverage question is made at this time. It appears, therefore, that the interests of justice would best be served by an immediate determination of this basic question.

12. Said question of coverage is essentially a question of law, which, the petitioner believes, the Court could determine by merely examining the provisions of Section 403 (a) of the Renegotiation Act, wherein the term "Department" is clearly defined, and the specific contract, which shows on its face that it is a contract made by a private American corporation with a department or agency of the British Government. Nevertheless, if either party or the Court believes that other facts should be considered, the facts pertaining to this issue are matters of public record, not subject to dispute, and counsel should be able to agree on a stipulation in respect to any facts not already appearing in the record.

WHEREFORE, petitioner prays that the Court sever, and decide in the first instance, apart from any other issue raised by the pleadings, the basic issue of whether the specific contract referred to in respondents' Order Determining Excessive Profits, dated March 31, 1949, was a
51 contract covered by the Renegotiation Act and subject to renegotiation by the Chairman of the Maritime Commission under authority of said Act.

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251817—53—3

[CAPTION]

52 ORDER OF CONTINUANCE

This proceeding came on for hearing March 1, 1950, at Washington, D. C., upon petitioner's motion for severance of the issues. Counsel for the parties argued the motion. After due consideration, it is

ORDERED, that the hearing on petitioner's motion for severance of issues is continued to 10:00 a. m., April 12, 1950, at Washington, D. C.

/s/ R. L. Disney,
Judge.

Dated: Washington, D. C., March 1, 1950.

[CAPTION]

53 MOTION FOR LEAVE TO FILE AMENDED ANSWER

Comes now the respondent by the Acting Assistant Attorney General of the United States and moves the Court for leave to file herein the attached amended answer.

Respectfully submitted,

NEWELL A. CLAPP,
Acting Assistant Attorney General.

FREDERICK N. CURLEY,
Attorney,
Department of Justice.

54 MEMORANDUM IN SUPPORT OF MOTION

On August 10, 1949, respondent filed an answer to the petition. The amended answer, for which leave of Court to file is sought by this motion, is substantially in accord with the answer heretofore filed by respondent. This amended answer does not place in issue any new or additional issues.

This amended answer is filed pursuant to the provisions of Rule 17 and Rule 64 of the Rules of Practice before the Tax Court of the United States.

Counsel for the petitioner has informally advised re-

spondent that petitioner has no objection to the granting of this motion.

Respectfully submitted,

NEWELL A. CLAPP,
Acting Assistant Attorney General.

FREDERICK N. CURLEY,
Attorney,
Department of Justice.

[CAPTION]

55 AMENDED ANSWER

Comes now the respondent by the Acting Assistant Attorney General of the United States and for an amended answer to the petition filed herein says:

1. Respondent admits the allegations contained in the first sentence of paragraph 1 of the petition. Respondent is without knowledge or information sufficient to form a belief concerning the remaining allegations contained in paragraph 1 of the petition, and therefore denies them.

2. Respondent admits the allegations contained in paragraph 2 of the petition.

3. With respect to the allegations contained in the various subparagraphs of paragraph 3 of the petition, respondent admits and denies as follows:

(a). Respondent admits such allegations contained in subparagraph (a) as are borne out by his order dated March 31, 1949, a copy of which is attached to the petition as Exhibit A. Respondent denies the remaining allegations contained in subparagraph (a), and alleges that $164,000 is not the total amount in controversy.

56 (b). Respondent admits such allegations contained in subparagraph (b) as are borne out by his order dated March 31, 1949, a copy of which is attached to the petition as Exhibit A. Respondent denies the remaining allegations contained in subparagraph (b) and alleges that the charter involved herein (a copy of which is attached to the petition as Exhibit B) is a contract or subcontract with a Department named in the Renegotiation Act of 1942, as amended, and further alleges that in signing said charter, the British Ministry of War Transport was acting for and

on behalf of a Department named in the Renegotiation Act of 1942, as amended.

4. Respondent denies that it erred either as charged or implied in paragraph 4 of the petition and in the various subparagraphs thereunder or in any other manner whatsoever. However, to the extent that any of these assignments of error may be deemed to be material allegations of fact, they are denied.

5. With respect to the allegations contained in the various subparagraphs of paragraph 5 of the petition, respondent admits and denies as follows:

(a). Respondent admits the allegations contained in the first sentence of subparagraph (a). Respondent is without knowledge or information sufficient to form a belief concerning the remaining allegations contained in subparagraph (a), and therefore denies them.

(b). Respondent admits that Exhibit B attached to the petition is a true copy of the charter. Respondent further admits such allegations contained in subparagraph (b) as are borne out by Exhibit B except respondent denies
57 that Exhibit B was executed on May 29, 1941, and alleges that this charter is a contract or subcontract with a Department named in the Renegotiation Act of 1942, as amended, and further alleges that in signing said charter, the British Ministry of War Transport was acting for and on behalf of a Department named in the Renegotiation Act of 1942, as amended. Respondent is without knowledge or information sufficient to form a belief concerning the remaining allegations contained in subparagraph (b), and therefore denies them.

(c). Respondent denies the allegations contained in the first sentence of subparagraph (c) and alleges that the charter involved herein is a contract or subcontract with a Department named in the Renegotiation Act of 1942, as amended, and further alleges that in signing said charter, the British Ministry of War Transport was acting for and on behalf of a Department named in the Renegotiation Act of 1942, as amended. As to the remaining allegations contained in subparagraph (c), respondent admits such allegations as are borne out by Exhibit B attached to the petition and denies the remaining allegations contained therein.

(d). Respondent is without knowledge or information sufficient to form a belief concerning the allegations contained in subparagraph (d), and therefore denies them.

(e). Respondent admits that it paid to the petitioner the sum of $336,577 and alleges that said sum was not the final payment made pursuant to said charter. Respondent further alleges that the charter under which the payment of $336,577 was made by the Maritime Commission is a contract or subcontract with a Department named in the Renegotiation Act of 1942, as amended, and further
58 alleges that in signing said charter, the British Ministry of War Transport was acting for and on behalf of a Department named in the Renegotiation Act of 1942, as amended. Respondent further alleges that said payment of $336,577 was paid to petitioner by the Maritime Commission from funds appropriated by the Congress of the United States for the use and benefit of the United States. Respondent is without knowledge or information sufficient to form a belief concerning the allegations contained in the third sentence of subparagraph (e), and therefore denies them. Respondent denies the remaining allegations contained in subparagraph (e).

(f). Respondent admits the allegations contained in the first sentence of subparagraph (f). The remaining allegations contained in subparagraph (f) are conclusions of law not requiring answer; however, insofar as they may be material allegations of fact, respondent admits those allegations which are borne out by the Renegotiation Act of 1942, as amended, and denies the remaining allegations.

(g). As to the allegations contained in subparagraph (g), respondent admits those allegations which are borne out by the provisions of the Renegotiation Act of 1942, as amended. The remaining allegations contained in subparagraph (g) are conclusions of law not requiring answer; however, insofar as they may be deemed to be material allegations of fact, they are denied.

(h). As to the allegations contained in subparagraph (h), respondent admits those allegations which are borne out by the provisions of the Renegotiation Act of 1942, as amended.
The remaining allegations contained in subparagraph
59 (h) are conclusions of law not requiring answer; however, insofar as they may be deemed to be material allegations of fact, they are denied.

(i). As to the allegations contained in the first sentence of subparagraph (i), respondent admits that petitioner received the sums of $14,700 and $295.78 in accordance with provisions of Exhibit B and alleges that said payments were

made to the petitioner by the Maritime Commission from funds appropriated by the Congress of the United States for the use and benefit of the United States. For lack of knowledge and information, respondent denies the remaining allegations contained in the first sentence of subparagraph (i). The allegations contained in the last sentence of subparagraph (i) are conclusions of law not requiring answer; however, insofar as they may be deemed to be material allegations of fact, they are denied. Respondent denies the remaining allegations contained in subparagraph (i).

(j). Respondent admits that on November 27, 1943, it forwarded to the petitioner a letter signed by "John R. Paull, Price Adjustment Board", and admits those allegations contained in subparagraph (j) which are borne out by the provisions of said letter, a true copy of which is attached to the answer filed August 10, 1949, and marked Exhibit 1. Respondent alleges that the charter which was the subject of this proceeding is a contract or subcontract with a Department named in the Renegotiation Act of 1942, as amended, and further alleges that in signing said charter (Exhibit B attached to the petition), the British Ministry of War Transport was acting for and on behalf of a Department named in the Renegotiation Act of 1942, as
60 amended. For lack of knowledge and information, respondent denies the remaining allegations contained in subparagraph (j).

(k). The allegations contained in subparagraph (k) are not material allegations of fact requiring answer; however, insofar as they may be deemed to be material allegations of fact, respondent admits that it received a letter from petitioner dated December 9, 1943, and denies the remaining allegations.

(l). The allegations contained in subparagraph (l) are not material allegations of fact requiring answer; however, insofar as they may be deemed to be material allegations of fact, they are admitted.

(m). Respondent admits such allegations contained in subparagraph (m) as are borne out by its order dated March 31, 1949, a copy of which is attached to the petition as Exhibit A. Respondent denies the remaining allegations contained in subparagraph (m).

(n). Respondent admits the allegations contained in subparagraph (n).

(o). The allegations contained in subparagraph (o) are not material allegations of fact requiring answer; however, insofar as they may be deemed to be material allegations of fact, respondent admits that it received the sum of $54,000 from petitioner on May 31, 1949, and denies the remaining allegations contained therein.

(p). The allegations contained in subparagraph (p) are conclusions of law not requiring answer; however, insofar as they may be deemed to be material allegations of fact, they are denied. Respondent alleges that the charter involved herein is a contract or subcontract with a
61 Department named in the Renegotiation Act of 1942, as amended, and further alleges that in signing said charter (Exhibit B attached to the petition), the British Ministry of War Transport was acting for and on behalf of a Department named in the Renegotiation Act of 1942, as amended.

(q). The allegations contained in subparagraph (q) are conclusions of law not requiring answer; however, insofar as they may be deemed to be material allegations of fact, they are denied.

(r). The allegations contained in the last sentence of subparagraph (r) are conclusions of law not requiring answer; however, insofar as they may be deemed to be material allegations of fact, they are denied. For lack of knowledge or information sufficient to form a belief, respondent denies the remaining allegations contained in subparagraph (r), except that respondent admits that petitioner's receipts or accruals from the contract involved herein were in the amount of at least $351,277.00; that petitioner's net profits derived therefrom were in the amount of at least $196,600.65, except for lack of knowledge or information sufficient to form a belief, respondent denies that said $196,600.65 represents the total net profit derived therefrom.

Respondent denies generally and specifically each and every material allegation of fact contained in the petition not hereinbefore expressly admitted, qualified, or
62 denied.

WHEREFORE, respondent prays this Court to

determine that petitioner's excessive profits for the fiscal period involved herein were not less than $164,000.

Respectfully submitted,

NEWELL A. CLAPP,
Acting Assistant Attorney General.

FREDERICK N. CURLEY,
Attorney,
Department of Justice.

[CAPTION]

86 ORDER

This proceeding came on for hearing April 12, 1950, at Washington, D. C., upon petitioner's motion for a severance of issues. Counsel for the parties argued the motion. After due consideration, it is

ORDERED, that petitioner's motion is granted and the proceeding is placed upon the Washington, D. C., calendar for hearing in due course.

(Seal.) (S.) John W. Kern,
Judge.

Dated: Washington, D. C., April 12, 1950.

[CAPTION]

87 AGREED STATEMENT OF ISSUES AND STIPULATION OF FACTS
March 16, 1951

88 I. *Agreed Statement of Issues*

The Court by order dated April 12, 1950, having granted petitioner's motion for a severance of the issues, there is now presented to this Court for its determination the following issues:

(a) Was the charter dated May 29, 1941 (hereinafter offered in evidence as Exhibit 1) between the petitioner and the British Ministry of War Transport a contract, or a subcontract thereunder, with a "Department" as defined in Section 403 (a) of the Renegotiation Act of 1942, as amended (hereinafter referred to as the Act)?

(b) Was the final payment pursuant to said charter (Exhibit 1), within the meaning of Section 403 (c) (6) of the Act, made prior to April 28, 1942?

89 (c) Was the renegotiation proceeding involved herein commenced by the respondent within one year

after the close of the fiscal year of the petitioner within which completion or termination of said charter (Exhibit 1) occurred, within the meaning of Section 403 (c) (6) of the Act?

(d) Was the charter (Exhibit 1) subject to renegotiation?

The parties to this proceeding respectfully request that this Court consider and determine the answer to each of the above stated issues.

II. *Stipulation of Facts*

It is hereby stipulated and agreed by and between the parties hereto that the following statements may be accepted by the Court as true facts and proved for the purpose of this proceeding, and that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence at the time of the hearing on the above issues not inconsistent with the facts herein stipulated; provided, however, that each party hereby expressly reserves the right to object to the introduction of any exhibit or other evidence stipulated herein on the ground that it is immaterial, irrelevant or incompetent to prove the issues specified above.

1. Petitioner is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business at No. 1010 Washington Street, Vancouver, Washington. Effec-
90 tive as of March 16, 1942, petitioner acquired all the assets and assumed all the liabilities of "California Eastern Line, Inc.," an Oregon corporation, and became the lawful successor to said Oregon corporation. Therefore, for the purposes of this proceeding, including this stipulation, the term "petitioner" means the Oregon corporation as to all events occurring on or before March 15, 1942, and the Delaware corporation as to all events occurring on or after March 16, 1942.

2. By a charter dated May 29, 1941, petitioner, as owner of the American steamship "VERMONT," entered into a written contract (designated therein and hereinafter referred to as a "charter") with the British Ministry of War Transport, an agency of the British Government, as charterers of said vessel. Said charter was executed for and on behalf of the petitioner and said British Ministry of War Transport by their duly authorized representatives. A copy of said charter is attached hereto marked Exhibit 1.

3. R. A. Nicol (hereinafter referred to as Nicol), who as President of R. A. Nicol & Co., Inc., signed said charter, was duly authorized to represent petitioner in discussions with the Maritime Commission and to execute said charter for and on petitioners' behalf.

4. Sir T. A. Sparks (hereinafter referred to as Sparks), who as "Representative in the U. S. A." signed said charter, was duly authorized by the British Ministry of War Transport to execute said contract for and on its behalf.

91 5. G. A. Helmbold (hereinafter referred to as Helmbold), who as Director, Operations and Traffic, approved said charter, was duly authorized by the United States Maritime Commission to approve said charter for and on its behalf. Such authority was granted to Helmbold by a Resolution approved by the Maritime Commission at a meeting held in Washington on May 29, 1941. (See Exhibit 40 below.)

6. On May 29, 1941, said steamship "VERMONT," having loaded the cargo which the British Ministry of War Transport furnished at the port of New York, sailed from that port and proceeded as ordered by charterers to Port Sudan, a port in the Red Sea range, and there delivered said cargo as directed by charterers' agents. The delivery of said cargo was finished at Port Sudan on August 8, 1941.

7. On June 23, 1941, petitioner received full payment of the agreed freight payable by the charterers under the terms of Clause 1 of said charter, to wit, the sum of $336,577. (See Stipulation, Paragraph 76, infra.) Said freight was paid to petitioner by the Maritime Commission pursuant to a certain inter-governmental "arrangement," dated June 9, 1941, between the Office of Emergency Management, an agency of the United States Government, and the British Merchant Shipping Mission, another agency of the British Government. (See Stipulation, Paragraph 58, infra.) Petitioner was not a party to said inter-governmental arrangement, nor was it consulted by either Government as to the terms and conditions thereof. The full amount of
92 said freight was paid to petitioner by the Maritime Commission from lend-lease funds appropriated by Congress in the Defense Aid Supplemental Appropriation Act, 1941, and allocated by the President to the Maritime Commission. (See Stipulation, Paragraph 73, infra.)

8. On July 31, 1942, petitioner received payment of demurrage in the amount of $14,700. (See Stipulation, Paragraph 78, infra) and, on November 4, 1942, reimbursement

for overtime paid to the crew in the amount of $295.78 (See Stipulation, Paragraph 79, infra), both of which amounts were also payable by the charterers under the terms of said charter. Each of said payments was made by the Maritime Commission pursuant to the aforesaid inter-governmental arrangement dated June 9, 1941.

9. On November 29, 1943, petitioner received a letter from the Maritime Commission, dated November 27, 1943, signed "John R. Paull, Price Adjustment Board," and captioned: "Subject: *Notice of Initial Conference under the Renegotiation Act which shall constitute Commencement of Renegotiation.*" Attached hereto and marked Exhibit 2 is a true copy of said letter.

10. On March 31, 1949, W. W. Smith, Chairman of the Maritime Commission, issued and entered an order determining that petitioner had realized excessive profits under a contract with the Departments, as defined in the Renegotiation Act. Attached hereto and marked Exhibit 3 is
93 a true copy of said order. The aforesaid charter (Exhibit 1) is the specific contract referred to in respondent's said order.

11. On February 25, 1941, the United States Maritime Commission created a Division of Emergency Shipping to handle all emergency transportation problems and to have supervision over sales, charters, transfers, reallocations, reassignments and requisitions of all vessel tonnage in connection with emergency transportation. By Executive Order No. 9054 (7 F. R. 837) dated February 7, 1942, the President created the War Shipping Administration and transferred certain functions, duties and funds of the Maritime Commission thereto.

12. Petitioner has at all times relevant hereto kept and maintained its books and records, and filed its Federal income tax returns on an accrual basis. With the exception of the calendar year 1942, petitioner's fiscal year commenced on January 1, and was completed on December 31 of each year, including the fiscal year ended December 31, 1941. During 1942, because of the facts described in Paragraph 1, supra, the Oregon corporation closed its books and records and filed its Federal income tax returns for the fiscal year January 1, 1942, to March 15, 1942, and the Delaware corporation's fiscal year began on March 16, 1942, and ended on December 31, 1942. The Delaware corporation filed its income tax return for that fiscal year.

13. The S. S. "VERMONT" was owned by petitioner. Mr. C. E. Dant (hereinafter sometimes referred to as Dant)

was authorized to represent petitioner in discussions
94 with the Maritime Commission preceding the execution of the charter (Exhibit 1).

14. The charter (Exhibit 1) provided for the transportation of cargo from the United States to the Red Sea area. Thereafter, the vessel was worked homeward with commercial cargo, including strategic materials, for the account of the owners.

15. Exhibit 1 was the only charter which petitioner signed with the British Ministry of War Transport for a voyage to the Red Sea area during 1941 or 1942.

16. The following is an abstract of the log of the S. S. "VERMONT" from May 13, 1941 to August 8, 1941.

May 13, 1941, 11:00 p.m. Arrived New York City after unloading in Philadelphia, Pa.

May 14, 1941, 8:35 a.m. Arrived Bethlehem Shipyard, Brooklyn, N. Y.

May 24, 1941, 6:45 a.m. Departed Bethlehem Shipyard, Brooklyn, N. Y.

May 24, 1941, 7:48 a.m. Vessel docked, Staten Island, New York City.

May 24, 1941, 8:00 a.m. Commenced loading.

May 28, 1941, 7:00 a.m. Finished loading at Staten Island.

May 28, 1941, 4:22 p.m. Cleared pier, Staten Island, for Bayonne Terminal.

May 28, 1941, 5:02 p.m. Arrived Bayonne Terminal.

May 29, 1941, 7:00 a.m. Commenced loading explosives.

May 29, 1941, 3:00 p.m. Finished loading explosives.

May 29, 1941, 7:42 p.m. Sailed from Bayonne Terminal en route to Port Sudan. Stops made at Trinidad, B.W.I., Port of Spain, Capetown and Aden.

95 July 28, 1941, 10:28 a.m. Arrived Port Sudan (discharge port).

Aug. 3, 1941, 3:34 p.m. Docked Port Sudan.

Aug. 3, 1941, 5:30 p.m. Commenced discharging.

Aug. 8, 1941, (midnight). Finished discharging.

17. The following is an abstract of the log of the S. S. "VERMONT" from August 9, 1941 to December 10, 1941.

Aug. 10, 1941, 2:40 p.m. Sailed from Port Sudan, bound for Karachi, India.

Aug. 20, 1941, 7:48 a.m. Arrived Karachi, India.

Aug. 20, 1941, 10:28 a.m. Vessel docked.

Aug. 20, 1941, 6:00 p.m. Commenced loading.

Aug. 25, 1941, 10.00 p.m. Finished loading.

Aug. 26, 1941, 11:07 a.m. Sailed from Karachi, India, en route to Calcutta, India.

Sept. 7, 1941, 5:30 a.m. Arrived Calcutta, India.

Sept. 8, 1941, 10:30 p.m. Vessel docked.

Sept. 9, 1941, 7:00 a.m. Commenced unloading.

Sept. 18, 1941, 3:[illegible] a.m. Finished unloading.

Sept. 19, 1941, 5:30 p.m. Commenced loading.

Sept. 24, 1941, 11:45 a.m. Finished loading.

Sept. 24, 1941, 1:32 p.m. Sailed from Calcutta, India, en route to New York City, Norfolk, Va., and Baltimore, Maryland, with stops at Columbo, Capetown and Trinidad, B.W.I.

Nov. 30, 1941, 5:16 p.m. Arrived New York City.

Dec. 1, 1941, 10:19 a.m. Vessel docked, Staten Island.

Dec. 1, 1941, 1:00 p.m. Started discharging.

Dec. 5, 1941, 11:00 a.m. Finished discharging New York cargo.

Dec. 6, 1941, 7:14 a.m. Sailed from New York City en route for Norfolk, Va.

96 Dec. 7, 1941, (noon). Arrived Norfolk, Va.

Dec. 7, 1941, 3:21 p.m. Vessel docked.

Dec. 7, 1941, 7:00 p.m. Started discharging.

Dec. 9, 1941, 2:30 p.m. Finished discharging Norfolk, Va., cargo.

Dec. 9, 1941, 3:57 p.m. Sailed from Norfolk, Va., en route to Baltimore, Md.

Dec. 10, 1941, 9:53 a.m. Vessel docked Baltimore, Md.

Dec. 10, 1941, 10:00 a.m. Started discharging.

Dec. 10, 1941, 5:00 p.m. Finished discharging Baltimore, Md., cargo.

18. The British Ministry of War Transport, whose home office was in London, England, was an agency of the British Government and was not a citizen of the United States.

19. Attached hereto and marked Exhibit 4 is a true copy of "Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission," dated March 31, 1943.

20. Attached hereto and marked Exhibit 5 is a true copy of a letter from the President to Admiral Emory S. Land, Chairman of the United States Maritime Commission (hereinafter sometimes referred to as Land), dated February 10, 1941.

21. On April 10, 1941, the President issued Presidential Proclamation No. 2474, a true extract of which is attached hereto and marked Exhibit 6. This proclamation altered the then existing restrictions affecting American shipping and made it lawful for American vessels to proceed through

the Gulf of Aden into the Red Sea area as far as Port Said.

97 22. During April, 1941, prior to the President's proclamation of an unlimited national emergency on May 27, 1941, several informal discussions were held by officials of the Maritime Commission with certain American shipowners. On April 25, 1941, a meeting was called by officials of the Maritime Commission to point out to these shipowners or their representatives that vessels were needed to transport cargo for the British Ministry of War Transport to the Red Sea area, and to work out an arrangement which would secure the amount of tonnage needed for such an operation. Present at that meeting, in addition to the representatives of the Maritime Commission, were, representatives of the petitioner and other companies that subsequently sent ships into the Red Sea area for this operation.

23. Attached hereto and marked Exhibit 7, is a true copy of a letter from the President to Land, dated April 30, 1941. Prior to this conference of April 25, 1941, officials of the Maritime Commission had been informed as to the contents of Exhibit 7.

24. Attached hereto and marked Exhibit 8 is a true copy of a letter from H. Harris Robson, Director, Emergency Shipping Division, United States Maritime Commission (hereinafter sometimes referred to as Robson), to Nicol, dated April 26, 1941.

25. Pursuant to the President's request (Exhibit 7), further discussions were held between representatives of the Maritime Commission and certain owners or representatives of American vessels engaged in the intercoastal trade, including petitioner, in an effort to secure the neces-

98 sary tonnage, determine the rates, charter party provisions, etc., for the transportation of goods and materials needed by the British Government relative to the proposed Red Sea service. Such conferences were held on May 3, 7, 9, 13, 16, and 21, 1941.

26. Attached hereto and marked Exhibit 9 is a true copy of a telegram from Dant to Marshal L. Wilcox, Assistant Director of the Division of Emergency Shipping, United States Maritime Commission (hereinafter sometimes referred to as Wilcox), dated May 5, 1941.

27. Attached hereto and marked Exhibit 10 is a true copy of an extract of the minutes of a meeting of the United States Maritime Commission held May 6, 1941.

28. Attached hereto and marked Exhibit 11 is a true copy of a telegram from Nicol to Wilcox, dated May 6, 1941.

29. Attached hereto and marked Exhibit 12 is a true copy of a letter from Nicol to Wilcox, dated May 7, 1941.

30. Attached hereto and marked Exhibit 13 is a true copy of a telegram from Wilcox to Nicol, dated May 10, 1941.

31. Attached hereto and marked Exhibit 14 is a true copy of a letter from Granville Conway, District Manager, North Atlantic District, United States Maritime Commission (hereinafter sometimes referred to as Conway), to David Scoll, Assistant to Commissioner Vickery, U. S. Maritime Commission, dated May 10, 1941.

32. Attached hereto and marked Exhibit 15 is a true copy of a letter from Helmbold to Conway, dated May 16, 1941. The ships indicated therein subsequently loaded and sailed to the Red Sea Area.

99 33. The following are true copies of communications between John E. Cushing, President, American-Hawaiian Steamship Company (hereinafter sometimes referred to as Cushing), and officials of the Division of Emergency Shipping, U. S. Maritime Commission, as to the terms and conditions of the proposed Red Sea charters:

(a) Attached hereto and marked Exhibit 16 is a true copy of a letter from Cushing to Wilcox dated May 9, 1941, together with a true copy of the enclosure referred to therein.

(b) Attached hereto and marked Exhibit 17 is a true copy of a letter from Wilcox to Cushing dated May 12, 1941.

(c) Attached hereto and marked Exhibit 18 is a true copy of a teletype from Cushing to Wilcox dated May 13, 1941. Attached hereto and marked Exhibit 19 is a true copy of the additional clauses referred to in Exhibits 17 and 18.

(d) Attached hereto and marked Exhibit 20 is a true copy of a teletype from Wilcox to Cushing, dated May 14, 1941.

(e) Attached hereto and marked Exhibit 21 is a true copy of a teletype from Cushing to Wilcox dated May 14, 1941.

(f) Attached hereto and marked Exhibit 22 is a true copy of a teletype from Wilcox to Cushing dated May 14, 1941.

(g) Attached hereto and marked Exhibit 23 is a true copy of a letter from Cushing to Wilcox dated May 15, 1941.

(h) Attached hereto and marked Exhibit 24 is a true copy of a telegram from Cushing to Wilcox dated May 15, 1941.

(i) Attached hereto and marked Exhibit 25 is a true copy of a memorandum from Cushing to A. E. King, an
100 official of the Maritime Commission (hereinafter sometimes referred to as King), dated May 17, 1941.

34. Cushing advised petitioner, among other owners, concerning the contents of the communications set forth in paragraph 33 and obtained their views thereon. In general, the clauses and changes referred to therein were incorporated in the final form of charters used.

35. Attached hereto and marked Exhibit 26 is a true copy of a radiogram from Oliver P. Caldwell, an official of the Luckenbach Steamship Company, to King, dated May 19, 1941.

36. Attached hereto and marked Exhibit 27 is a true copy of a radiogram from H. S. Brown, Intercoastal Steamship Freight Association (hereinafter sometimes referred to as Brown), to King, dated May 19, 1941. The Intercoastal Steamship Freight Association, of which petitioner was then a member, was a non-profit association of steamship lines engaged in the intercoastal trade.

37. Attached hereto and marked Exhibit 28 is a true copy of a letter from King to Brown, dated May 20, 1941.

38. Attached hereto and marked Exhibit 29 is a true copy of an undated communication from Brown to King.

39. Attached hereto and marked Exhibit 30 is a true copy of a telegram from Nicol to King dated May 21, 1941.

40. Attached hereto and marked Exhibit 31 is a true copy of a memorandum from King to Helmbold, dated May 21, 1941.

41. Attached hereto and marked Exhibit 32 is a true copy of an extract from the minutes of a meeting of the United States Maritime Commission held May 21, 1941.

101 42. Attached hereto and marked Exhibit 33 is a true copy of a telegram from King to Nicol dated May 23, 1941.

43. Attached hereto and marked Exhibit 34 is a true copy of a telegram from Nicol to King dated May 23, 1941.

44. Attached hereto and marked Exhibit 35 is a true copy of a telegram from King to Nicol dated May 23, 1941.

45. Attached hereto and marked Exhibit 36 is a true copy of a letter from Robson to States Steamship Company, dated May 24, 1941. Although addressed to States Steamship Company, said letter was intended for and delivered to petitioner.

46. Attached hereto and marked Exhibit 37 is a true copy of a letter from Helmbold to Conway, dated May 24, 1941.

47. On May 27, 1941, the President issued Presidential Proclamation No. 2487, proclaiming that a state of unlimited national emergency existed as of that date.

48. Attached hereto and marked Exhibit 38 is a true copy of a letter from Helmbold to Nicol, dated May 28, 1941. Attached thereto was an unsigned copy of the charter (Exhibit 1).

49. Attached hereto and marked Exhibit 39 is a true copy of an extract from the minutes of a meeting (first session) of the United States Maritime Commission held May 29, 1941.

50. Attached hereto and marked Exhibit 40 is a true copy of an extract from the minutes of a meeting (second session) of the United States Maritime Commission held May 29, 1941.

51. Attached hereto and marked Exhibit 41 is a true copy of a letter from Helmbold to Nicol, dated May 31, 1941.

102 52. Attached hereto and marked Exhibit 42 is a true copy of a letter from W. C. Peet, Jr., Secretary, United States Maritime Commission (hereinafter sometimes referred to as Peet), to petitioner, dated June 2, 1941.

53. Attached hereto and marked Exhibit 43 is a true copy of a letter from Helmbold to Conway, dated June 2, 1941.

54. Attached hereto and marked Exhibit 44 is a true copy of a letter from Nicol to the British Ministry of War Transport, dated June 3, 1941.

55. Attached hereto and marked Exhibit 45 is a true copy of a letter from Helmbold to Nicol, dated June 7, 1941.

56. Attached hereto and marked Exhibit 46 is a true copy of a letter from Nicol to Helmbold, dated June 9, 1941.

57. Attached hereto and marked Exhibit 47 is a true copy of a letter from Nicol to John Gammie, Deputy Representative in the U. S. A. of the British Ministry of War Transport (hereinafter sometimes referred to as Gammie), dated June 9, 1941.

58. Attached hereto and marked Exhibit 48 is a true copy of a letter from Major General J. H. Burns, USA, Executive Officer, Division of Defense Aid Reports (hereinafter sometimes referred to as Burns), to British Merchant Shipping Mission, dated June 9, 1941.

59. Attached hereto and marked Exhibit 49 is a true copy of a letter from Gammie to Nicol, dated June 10, 1941. The charter (Exhibit 1) referred to in said letter was signed by Sparks on or about June 10, 1941.

103 60. Attached hereto and marked Exhibit 50 is a true copy of a letter and attachments from Conway to Helmbold, dated June 10, 1941.

61. Attached hereto and marked Exhibit 51 is a true copy of a letter from Nicol to Conway, dated June 11, 1941. The charter referred to therein is the charter (Exhibit 1).

62. Attached hereto and marked Exhibit 52 is a true copy of a letter from Nicol to the British Ministry of War Transport, dated June 11, 1941.

63. Attached hereto and marked Exhibit 53 is a true copy of a letter from Helmbold to Nicol, dated June 14, 1941.

64. Attached hereto and marked Exhibit 54 is a true copy of a letter from Conway to Nicol, dated June 19, 1941.

65. Attached hereto and marked Exhibit 55 is a true copy of a letter from Conway to Nicol, dated June 21, 1941.

66. Attached hereto and marked Exhibit 56 is a true copy of a letter from Helmbold to Nicol, dated May 2, 1941.

67. Attached hereto and marked Exhibit 57 is a true copy of a letter from King to States Steamship Company, dated July 12, 1941.

68. Attached hereto and marked Exhibit 58 is a true copy of the Accounts and Procedures Letter No. 2475, dated April 18, 1941, issued by the Comptroller General of the United States to the Maritime Commission. The funds allocated by the President under Exhibit 63, infra, were subsequently transferred to appropriation account No. 69-111/30023 entitled "Defense Aid, Vessels and other Water Craft (Allotment to United States Maritime Commission), 1941-1943". The aforesaid appropriation account was
104 originally established by Exhibit 58, supra. The payment referred to in Paragraph 76, infra, was paid from funds allocated by Exhibit 63, infra, and from Account number 69-111/30023.

69. Attached hereto and marked Exhibit 59 is a true copy of Requisition No. 1503, dated May 15, 1941, signed by R. R. Powell, Secretary, British Merchant Shipping Mission.

70. Attached hereto and marked Exhibit 60 is a true copy of a letter from Burns to Harold D. Smith, Director, Bureau of the Budget, dated June 5, 1941.

71. Attached hereto and marked Exhibit 61 is a true copy of Requisition No. 1503A, dated June 9, 1941, and signed by R. R. Powell, Secretary, British Merchant Shipping Mission.

72. Attached hereto and marked Exhibit 62 is a true copy of Recommendation on Requisition for Defense Articles,

Form LLA3, for British Requisition 1503A, signed by Helmbold, dated May 29, 1941.

73. Attached hereto and marked Exhibit 63 is a true copy of a letter from the President to the Secretary of the Treasury, dated June 9, 1941.

74. Attached hereto and marked Exhibit 64 is a true copy of a letter from the President to the Chairman, United States Maritime Commission, dated June 9, 1941.

75. Attached hereto and marked Exhibit 65 is a true copy of a letter from Burns to John B. Blandford, Acting Director, Bureau of the Budget, dated June 30, 1941.

76. Attached hereto and marked Exhibit 66 is a true copy of a public voucher dated June 10, 1941 and attachments thereto submitted by petitioner for freight. This
105 voucher was paid by a check drawn on the Treasurer of the United States in the sum of $336,577, dated June 20, 1941. Petitioner credited this amount on its books and records on or about June 23, 1941, and included this item as income in its Federal income and excess profit tax returns for its fiscal year ended December 31, 1941.

77. Attached hereto and marked Exhibit 67 is a true copy of an Accounts and Procedures Letter No. 4245, dated March 9, 1942, issued by the Comptroller General of the United States to the War Shipping Administration.

78. Attached hereto and marked Exhibit 68 is a true copy of a public voucher dated July 13, 1942 and attachments submitted by petitioner for demurrage. This claim, in the amount of $15,265.55, was originally submitted by petitioner to the British Ministry of War Transport on or about February 19, 1942. The British Ministry forwarded this claim to the Maritime Commission. The Maritime Commission audited the claim, and returned it to the British Ministry on July 10, 1942, with revised calculations. The British Ministry advised petitioner of the same, and petitioner thereupon forwarded invoice and public voucher dated July 13, 1942 (Exhibit 68) to the British Ministry. The British Ministry forwarded same (Exhibit 68) to the Maritime Commission on July 14, 1942. This voucher (Exhibit 68) was paid by a check drawn on the Treasurer of the United States in the sum of $14,700, dated July 30, 1942. Petitioner credited this amount on its books and records on September 17, 1942, and included this item as income in its Federal income and excess profit tax returns for its fiscal year ended March 15, 1942.

106 79. Attached hereto and marked Exhibit 69 is a true copy of a public voucher dated October 5, 1942

and attachments submitted by petitioner for crew overtime. This claim, in the amount of $722.35, was originally submitted by petitioner to the British Ministry of War Transport on or about March 2, 1942. The British Ministry forwarded this claim to the Maritime Commission. The Maritime Commission audited the claim, and returned it to the British Ministry on September 30, 1942, with revised calculations. The British Ministry advised petitioner of the same, and petitioner thereupon forwarded invoice and public voucher dated October 5, 1942 (Exhibit 69) to the British Ministry. The British Ministry forwarded same (Exhibit 69) to the Maritime Commission on October 9, 1942. This voucher (Exhibit 69) was paid by a check drawn on the Treasurer of the United States in the sum of $295.78, dated October 30, 1942. Petitioner credited this amount on its books and records on or about November 4, 1942, and included this item as income in its Federal income and excess profit tax returns for its fiscal year ended March 15, 1942.

80. The cargo of the S.S. VERMONT, which was loaded in the port of New York from May 24, 1941 to May 29, 1941, consisted of flour, canned milk, trucks, tractors, airplanes, loaded bombs, etc.

107 81. Attached hereto and marked Exhibit 70 is a true copy of a letter from Conway to States Steamship Company dated June 27, 1941.

82. Attached hereto and marked Exhibit 71 is a true copy of a letter from Conway to States Steamship Company dated June 28, 1941.

83. Attached hereto and marked Exhibit 72 is a true copy of a letter from Nicol to Conway, dated June 30, 1941.

84. The allocation of costs chargeable to the voyage made pursuant to Exhibit 1, as subsequently requested by respondent, could not have been made by petitioner until the close of its 1941 fiscal year.

85. Attached hereto and marked Exhibit 73 is a true copy of a letter from Land to Lindsay C. Warren, Comptroller General of the United States, (hereinafter sometimes referred to as Warren), dated September 30, 1942.

86. Attached hereto and marked Exhibit 74 is a true copy of a letter from Warren to Land, dated October 9, 1942.

87. Attached hereto and marked Exhibit 75 is a true copy of the minutes of a meeting of the Maritime Commission held on November 19, 1942.

88. Attached hereto and marked Exhibit 76 is a true copy of a letter from Land to Edward J. Hart, Chairman, Special Subcommittee on Charter Rates, Committee on Merchant

Marine and Fisheries, House of Representatives, dated March 22, 1943.

108 89. Attached hereto and marked Exhibit 77 is a true copy of a letter from R. N. Elliott, Acting Comptroller General of the United States, (hereinafter sometimes referred to as Elliott), dated March 25, 1943.

90. Attached hereto and marked Exhibit 78 is a true copy of a letter from Land to Elliott, dated March 29, 1942.

Respectfully submitted,

HAROLD B. FINN,
ROBERT E. KLINE, JR.,
Counsel for Petitioner.

FREDERICK N. CUBLEY,
JAMES H. PRENTICE,
Counsel for Respondent.

March 16, 1951.

EXHIBIT 1

(Same as Exhibit B attached to Petition, see page 16.)

109 EXHIBIT 2

UNITED STATES MARITIME COMMISSION
Washington

November 27, 1943

REGISTERED MAIL—Return Receipt Requested

California Eastern Line, Inc.
17 Battery Place
New York, New York

Subject: *Notice of Initial Conference under the Renegotiation Act which shall constitute Commencement of Renegotiation.*

Gentlemen:

Price Adjustment Boards, pursuant to an Act of Congress, sometimes referred to as the "Renegotiation Act," have been established in the War, Navy, and Treasury Departments, the Maritime Commission, the War Shipping Administration, and the Reconstruction Finance Corporation. The function of these Price Adjustment Boards is (1)

to review the profits realized from prices in effect under contracts and subcontracts subject to renegotiation under the Act, and (2) to arrive at a settlement of the amount of excessive profits, if any, realized under the Act by the contractor, and, if none, to give him a clearance of liability therefor.

The renegotiation for your company has been assigned to the Commission's Price Adjustment Board.

Notice is given hereby that an initial conference with the Maritime Commission Price Adjustment Board is hereby set for 10:00 A.M., War Time, on December 20, 1943, at the office of the Board, Room 4879, Department of Commerce Building, Washington, D. C., (telephone: Executive 3340, Extension 606).

In the event that the time so fixed is not satisfactory to you, *the Board will entertain a request in writing in the form hereto attached, for a continuance of such conference* to a date not later than sixty (60) days from the date hereinabove fixed, provided that such request is received at the Board's address above not later than five days preceding the date hereinabove fixed.

It is requested, however, that at such initial conference the Commission's Price Adjustment Board be furnished with the following:

1 A detailed breakdown of terminated voyage revenue and expense and other income and expense during the calendar years 1941 and 1942, as between Government and commercial, showing separately the operation under Maritime Commission (British Ministry of War Transport) Charter Party of the vessel SS VERMONT.

110-111 (a) Government revenue is that received by you as owner or charterer where the voyage was made for the end use of the Government agencies above named.

(b) Commercial revenue is that received by you from private charterers where the voyage had no connection with activities carried on by one or more of the Government agencies above named.

2. A detailed breakdown of overhead in said period with a suggested allocation of same as between Government and commercial, showing separately that part which in your opinion should be allocated to the operation under Maritime Commission (British Ministry of War Transport) Charter Party covering vessel above referred to.

3. An analysis of depreciation.

4. Salaries and all other compensation (including commissions, bonuses, royalties, and other forms of extra compensation) of your officers and employees who received in excess of $10,000 per annum each for the years 1940, 1941, and 1942.

5. Salaries, if any, above stated which were questioned by the Federal income tax authorities.

6. A brief description of any bonus plan, pension trust, or other employee compensation plan in effect during the years 1940, 1941, or 1942.

7. An analysis of noncurrent liabilities to holding or subsidiary companies and of floating equipment reserves.

8. Certified or photostatic copy of income and excess profit tax return for the period, with supporting schedules for your company and your subsidiaries or affiliates.

You are at liberty at the initial conference to submit reasons why you cannot furnish the information within the requested period, as well as to state reasons why you are not subject to renegotiation. If you have filed with any other Government agency all or any part of the information, it is requested that you forward to us copies thereof or designate the agency and official to whom it was sent.

It is anticipated that after this information has been analyzed by us,—no extended period is required for that analysis,—a mutually satisfactory determination can be made as to whether you have realized excessive profits, within the meaning of the Act.

Very truly yours,

JOHN R. PAULL,
Price Adjustment Board.

Attachment

112

EXHIBIT 3

UNITED STATES MARITIME COMMISSION
Washington

March 31, 1949

REGISTERED MAIL (Return receipt requested)

NOTICE OF ORDER UNDER DELEGATED AUTHORITY DETERMINING EXCESSIVE PROFITS

Gentlemen:

You are hereby notified by registered mail that pursuant to renegotiation under the Renegotiation Act and pursuant to due authority, the Chairman of the United States Mari-

time Commission issued and entered an order on March 31, 1949, determining that of your profits derived from contracts with the Departments and subcontracts completed in your fiscal year ended December 31, 1942, one hundred sixty-four thousand dollars ($164,000) represents excessive profits which should be eliminated. A copy of such order is enclosed herewith.

Demand is hereby made for the payment of the amount of such excessive profits to be eliminated, less the tax credit, if any, referred to in such order. Any check should be drawn to the order of the Treasurer of the United States and delivered to the Chief of the Bureau of Finance, United States Maritime Commission, Department of Commerce Building, Washington 25, D. C.

Interest will accrue at the rate of six per cent per annum from and after May 31, 1949, on any amount due under such order and unpaid.

(Signed) JOHN R. PAULL.

John R. Paull, Chairman U. S. Maritime Commission
Price Adjustment Board, acting on behalf of the Chairman of the United States Maritime Commission

Enclosure
To: California Eastern Line, Inc.,
1010 Washington Street,
Vancouver, Washington.

Order No. 172

113

[Same as Exhibit A, attached to petition, See page 15]

[Exhibit 4—Omitted]

116 EXHIBIT 5

February 10, 1941.

My dear Mr. Chairman:

The successful conduct of the national defense program requires that our facilities for ocean transportation be fully coordinated; only in this way can maximum utilization of such shipping facilities be assured.

As Chairman of the United States Maritime Commission, you are in a strategic position to advise and assist me in assuring that our ocean shipping needs are cared for in an

expeditious and effective manner. Specifically, I shall wish your aid in respect to the following matters:

1. The analysis of the stated requirements of the War and Navy Departments and other agencies of the Government for merchant-vessel tonnage and facilities needed for ocean transportation of foreign and domestic commerce in connection with national defense.

2. Advise with owners and operators of ships registered under the United States relative to shipping routes, movements of vessels, and character of cargoes as defense requirements may make necessary.

3. The coordination of plans for the acquisition and creation of additional ships and facilities (a) to carry the water-borne commerce of the United States, including the transportation of strategic and critical materials, and (b) to act as military and naval auxiliaries.

4. The preparation of recommendations pertaining to (a) the acquisition of additional tonnage under foreign registry to meet ocean tonnage requirements for national defense, and (b) requests by other countries or their nationals for assistance in obtaining additional tonnage.

I should like to receive from you regular reports concerning the availability and adequacy of oceangoing ships and facilities for their operation, together with your recommendations. I particularly request that you give all assistance and cooperation to the Office of Production Management in expediting the shipment of materials which are essential to our production program. You will, of course, need to tie closely to the State Department on all matters involving foreign policy and relations.

Copies of this letter are being sent to the Secretaries of State, War, Navy, Treasury, and Commerce, and the Director General of the Office of Production Management. I am certain that these officials will inform you promptly of such problems as they may have involving ocean transportation, and will fully cooperate in facilitating the assistance that I am requesting of you.

Sincerely yours,

FRANKLIN D. ROOSEVELT.

117 EXHIBIT 6

From—Presidential Proclamation, No. 2474

Dated April 10, 1941

[6 F.R. 1906]

"Now, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred on me by section 3 (c) of the joint resolution of Congress approved November 4, 1939, do hereby modify my proclamation of June 11, 1940, defining combat areas into which it shall be unlawful, except under such rules and regulations as shall be prescribed, for any citizen of the United States or any American vessel, whether a surface vessel or an aircraft, to proceed, by eliminating from the scope of that proclamation the combat area defined in the second numbered section thereof as:

'Beginning at the intersection of the North Coast of Italian Somaliland with the meridian of 50° longitude east of Greenwich;

'Thence due north to the mainland of Arabia;

'Thence eastward along the coast of Arabia to the meridian of 51° east longitude;

'Thence due south to the mainland of Italian Somaliland;

'Thence westward along the coast of Italian Somaliland to the point of beginning.'

And I do hereby proclaim that it shall no longer be unlawful for any citizen of the United States or any American vessel, whether a surface vessel or an aircraft, to proceed into or through the area defined above."

118 EXHIBIT 7

April 30, 1941.

My dear Admiral:

As part of the defense effort to which this country is committed I wish you at the earliest possible moment to secure the service of at least 2,000,000 tons of merchant shipping which now exists and plan the operation thereof in such a manner as will make their cargo space immediately effective in accomplishing our objective of all-out aid to the democracies. I realize fully that to get cargo and refrigerated ships and tankers diverted from their existing or proposed routes of travel will cause not only great inconvenience but the loss of trade and sacrifies by the consuming

public. But vital war materials are piling up at the ports or delayed at the factories. We must supply those ships and at once. I am sure the owners of our ships will gladly cooperate in this essential enterprise.

This program falls naturally into two parts. First, to arrange for the utilization in routes to the combat zone of foreign ships or ships which are to be transferred to foreign registry and secondly, to reallocate our own flag ships, including those which will be completed in the next few months, in such a way as to make every cargo directly or indirectly useful to our defense efforts and the winning by the democracies of the battle now being waged in the Atlantic. As I indicated to you, I believe that you should assign a special person who will give his full time to the carrying out of this directive.

I have been pleased to hear of the progress you have made with the ship building program but I cannot stress too strongly the urgent necessity of keeping all of the existing shipyards in continuous operation. Every possible means should be immediately explored to increase the number of employees at work, to further develop the training program and to speed up the building of the additional shipbuilding ways already authorized.

I know from long experience of the great capacity of our shipbuilders and of the skill of the workers who build the ships, but our merchant fleet must be expanded faster than we had planned so that ships and more ships will be available to carry the food and the munitions of war to the democracies of the world.

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

119 EXHIBIT 8

Apr. 26, 1941.

Mr. R. A. Nicol,
17 Battery Place,
New York, New York.

Dear Mr. Nicol:

This will confirm conversation in our office Friday, the 25th, with you and Mr. Dant, wherein we requested you allocate four (4) vessels to the North Atlantic/Red Sea service for prompt position.

The first three of the vessels which you have selected to comply with the request are understood to be as follows:

VERMONT, available New York about May 8.
TEXAS, available New York about June 5.
ILLINOIS, available New York about June 20.

Consideration is being given to the lifting of the trading restrictions on the VERMONT.

Further details in connection with this service will be worked out the early part of next week.

We appreciate and thank you for your prompt compliance with our request.

Yours very truly,

H. HARRIS ROBSON
Director, Emergency Shipping.

120 EXHIBIT 9

1941 May 5 PM 3 12.
CB194 TWS Paid 5—Portland Org 5 1135A

M. L. Wilcox—United States Maritime Commission Wash D. C.

Regarding Red Sea business we have nominated Vermont Texas Illinois William L Thompson Stop We desire to cooperate to fullest extent possible and have so indicated to you as confirmed by Robsons letter of April 26 Stop We thought we had come to a definite understanding with you while in Washington Stop Now we find we are asked to operate under agents appointed by the Commission and to pay these subsidized agents a commission on our unsubsidized ships Stop On the first four ships this would amount to at least thirty thousand dollars in addition to what we would have to pay coming back Stop If the ships remain there and perhaps others added this may run into hundred of thousands of dollars when we could handle them ourselves for a fraction of that amount Stop We see no reason to pay other than an agency fee at both ends and do not consider it proper that our ships should be turned over to subsidized lines for operation Stop We are prepared to put into the Red Sea service at the commissions request and on the agreement recently arrived at with
121 you the four ships we have nominated Stop But must protest against any proposal to deliver our steamers to others for operation which is contrary to our definite understanding with you Stop You will remember Mr Garner asked you if we would have ' pay any commis-

sions to which you replied we would not Stop Another point was the Commissions clause with the Navy which relieved the ship of liability for damage to cargo Stop We would not receive the protection if the cargo was shipped on American Export Line Bills-of-lading nor on our own Bills-of-lading without a special clause Stop The Commissions Navy clause is most important in view of war conditions Stop We are so anxious to do what you want done that if you have strong reasons for insisting on your position we shall be glad to reconsider ours but we would like to know what these relations are. Kind regards.

States Steamship Company C E Dant.

122–123 EXHIBIT 10

United States of America

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

WASHINGTON, *September 29, 1950.*

I hereby certify that the annexed is a true copy of an extract from the minutes of a meeting of the United States Maritime Commission held May 6, 1941, relative to SS's MAINE, VERMONT, and WM. L. THOMPSON Waiver of trading restriction, as shown by the official minutes of the United States Maritime Commission on file in the Department of Commerce, Maritime Administration.

In witness whereof, I have hereunto set my hand on the day and year first above written.

[SEAL] R. L. McDONALD,
Secretary, Department of Commerce,
Maritime Administration.

SS: MAINE, VERMONT, and WM. L. THOMPSON—Waiver of trading restriction.

There was presented the following memorandum dated May 5, 1941, from Huntington T. Morse, Assistant to the Chairman:

124 "Subject: MAINE—ex-Pacific Pine (Built 1920) 8564 dwt. VERMONT—ex-Pacific Hemlock (Built 1919) 8527 dwt. WM. L. THOMPSON—ex-Pacific Spruce (Built 1920) 8584 dwt.

Request for waiver of trading restriction which prohibits vessels from operation in foreign commerce for 10 year period.

"The steamships MAINE and VERMONT, owned by the California Eastern Steamship Line, Inc. of Portland, Oregon, are, by the terms of our sales agreement with the owner, prohibited from operating in foreign commerce for a ten year period dating from July 21, 1937. The ships were sold for cash but we hold preferred mortgages on the vessels to secure performance of the owner's obligation not to operate them in foreign trade for the period specified.

"The Division, Operations and Traffic advise that as a result of conferences between the owner of these vessels, that Division, and the Emergency Shipping Division, arrangements have been made, whereby one or possibly both of these vessels will be used for operation between United States ports and the Red Sea. In view of this requirement, and the existing emergency conditions, it appears expedient that the restriction applying the MAINE and VERMONT be waived temporarily. The VERMONT is enroute to New York and we are advised will be ready for the proposed operation about May 8.

"The WM. L. THOMPSON, owned by the Thompson Salmon Company, Astoria, Oregon, was sold by the Maritime Commission to that Company in September 1938, for the sum of $55,000 cash, upon the condition that the vessel not be operated in trade or commerce (including the carrying of merchandise and passengers) between the United States, its territories or possessions, or the District of Columbia, and a foreign country, within the period of ten years after date of award.

"The performance of the condition under which the WM. L. THOMPSON was sold is secured as follows:

(a) A new bond for $10,000, executed by Thompson Salmon Company, as principal, and Maryland Casualty Company of Baltimore as surety.

(b) A bond for $90,000, executed by Thompson Salmon Company as principal and by Columbia River Packers Association, Inc. and all of the Directors of both corporations as sureties.

(c) Second mortgages on the vessel WM. L. THOMPSON and on the Naknek fish cannery, further securing the payment of the $90,000 bond and the performance of the agreement for the sale of the vessel.

"Ira L. Ewers, Attorney at Law, Washington, D. C., acting on behalf of the Thompson Salmon Company, Astoria, Oregon, owner of the WM. L. THOMPSON, has made applica-

tion to have waived the restriction by which the operation of this vessel is limited. In this connection the Division of Operations advise that the Emergency Shipping Division and Division, Operations wish this vessel placed immediately in the Red Sea Service, and that in view of the urgent need consider it expedient that the restriction applying to the WM. L. THOMPSON be waived temporarily.

"RECOMMENDATION:

"It is recommended that the Commission authorize the waiver of the operating restriction attaching to the MAINE and VERMONT during the period of the emergency declared to exist by the proclamation, dated September 8, 1939,
125 but not beyond June 30, 1942, upon condition that during the period that the waiver of the operating restriction is effective, the employment of these ships will be subject to direction by the Commission.

"It is recommended that the Commission authorize the waiver of the operating restriction attaching to the WM. L. THOMPSON, during the period of the emergency declared to exist by the proclamation, dated September 8, 1939, but not beyond June 30, 1942, upon condition that during the period that the waiver of the operating restriction is effective, the employment of these ships will be subject to direction by the Commission.

(Signed) HUNTINGTON T. MORSE,
Assistant to Chairman.

We concur:

(Signed) M. L. WILCOX,
Assistant Director,
Emergency Shipping Division.

(Signed) G. H. HELMBOLD,
Director, Division Operations & Traffic,
No Legal Objection, Subject to my memo of May 5, 1941, to be attached.

(Signed) FRANCIS B. GOERTNER,
Assistant General Counsel."

There was then presented the following memorandum dated May 5, 1941, from Assistant General Counsel Goertner:

"Subject: MAINE (ex-PACIFIC PINE); VERMONT (ex-PACIFIC HEMLOCK); WM. L. THOMPSON (ex PACIFIC SPRUCE)—Request for waiver of trading restriction which prohibits

vessels from operation in foreign commerce for 10-year period.

"I have no legal objection to the Commission authorizing such steps as may be necessary to give effect to Mr. Morse's recommendation of May 5, 1941. In view of the complications arising from the existence of these mortgages, and in the case of the WM. L. THOMPSON, the surety bonds given to insure performance of the trading restrictions, the details involved should be handled in close cooperation with the Legal Division. Furthermore, in the case of the THOMPSON, it is possible that the first mortgage on the vessel contains similar trading restrictions which also have to be taken care of. My recollection is that this mortgage is held by the Reconstruction Finance Corporation or by a bank which has a participation agreement with that agency. I therefore make the following additional recommendation:

"*Recommendation:*

"That all action taken hereunder shall be satisfactory in form and substance to Huntington T. Morse, Assistant to Chairman, and to the General Counsel or an Assistant General Counsel of the Commission.

(Signed) FRANCIS B. GOERTNER.
Assistant General Counsel"

After discussion, by the unanimous "yea" vote of the members of the Commission, the recommendations contained in the foregoing memorandum from Mr. Morse were approved as modified by the foregoing memorandum
126 from Assistant General Counsel Goertner, and the proper officers of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect.

127 EXHIBIT 11

WE36 96 3 EXTRA-CD New York NY 6 1018A

M. L. Wilcox, Asst. Dir. Emergency Shipping Div.
U. S. Maritime Commission Wash. D. C.

Vermont now New York discharging will complete Philadelphia twelfth Stop Reported our conversation of Saturday to Portland who I understand have telegraphed you Stop Am being asked for plans and particulars of ship

both by your office here and export steamship and if am to prepare this ship go Red Sea should know how much of agreement arrived at your office Friday April twenty-fifth now stands who is to pay freight and be responsible for demurrage and what consideration is being given Mr. Dants telegram to you will you let me hear from you.

R. A. Nicol, 17 Battery Place.

128 EXHIBIT 12

May 7, 1941

Mr. M. L. Wilcox
Assistant Director
Emergency Shipping Division
U. S. Maritime Commission
Washington, D. C.

Dear Mr. Wilcox:

SS "VERMONT"

This steamer will be discharged at Philadelphia on the 12th as previously advised. I regret, however, to now advise that owing to certain necessary repairs steamer will not be ready at New York to load before the 23d of this month. Everything possible is being done to assure readiness on that date.

Yours very truly,

129 EXHIBIT 13

May 10, 1941.

Mr. R. A. Nicol
17 Battery Place
New York, New York

Wiring Dant as follows quote have delayed reply your telegram May five due to additional difficulties which have arisen in connection with proposed service Stop Situation rapidly clearing and expect communicate fully with Nicol Monday unquote.

(Signed) M. L. WILCOX,
U. S. Maritime Commission.

130 EXHIBIT 14

UNITED STATES MARITIME COMMISSION

New York, N. Y.

May 10th, 1941.

Mr. David Scoll
Assistant to Commissioner Vickery
United States Maritime Commission
Washington, D. C.

Dear Mr. Scoll:

Confirming our telephone conversation of even date, we have made tentative arrangements with the British Ministry of Shipping, American Export Line, Inc., and Isthmian Line to take over Piers #9 and #10, Staten Island for the operation of the Red Sea ships.

On Friday, May 2nd, 1941, Mr. Helmbold and representatives of the British Ministry of Shipping, American Export Line, Inc., Isthmian Line and the undersigned attended a conference in connection with the Red Sea vessels at which time it was agreed that inasmuch as we would be sailing approximately fifteen (15) ships a month to the Red Sea area, it would be desirable to have two piers adjacent to one another where cargo would be interchanged as necessary in order to obtain the maximum stowage out of the cubic capacity of the ship.

Consideration was given to various piers in the Port of New York and it was finally decided that the two piers on Staten Island were most desirable for this purpose. The undersigned was delegated to negotiate for these piers and inasmuch as they are owned by the City of New York, I immediately contacted the Commissioner of Docks who was agreeable to leasing Piers #9 and #10, provided we would obtain the consent of the present lessees to cancel their lease.

The French Line who now have Pier #10 on lease from the City have kindly consented to surrender their lease to the Isthmian Line. The James L. Elwell and Company have also agreed to surrender their lease of Pier #9 to the American Export Lines, Inc.

131 Pier #10 will not require any dredging because the French Line dredged this dock a little more than a year ago at a cost of approximately $42,000.00. Pier #9 will require dredging in the amount of approximately $40,000.

The rental for these two piers will be paid direct to the City of New York by Isthmian Line and American Export Line, Inc.

The Commissioner of Docks has suggested a rental of $25,000.00 per annum for Pier #10 which will require no dredging and we are to negotiate on Pier #9 which pier will require, as indicated above, approximately $40,000.00 for dredging.

I believe that we can obtain Pier #9 for $15,000.00 per year which lower figure will eventually amortize the cost of dredging.

These arrangements were all agreed to at the conference with the understanding that the Isthmian Line and American Export Line, Inc., were to operate all of the Red Sea vessels out of this district and that the stevedoring and pier costs were not for the owner's account.

Very truly yours,

(S.) GRANVILLE CONWAY,
District Manager,
North Atlantic District.

132 EXHIBIT 15

May 16, 1941.

Captain Granville Conway
District Manager
U. S. Maritime Commission
45 Broadway
New York, New York

Dear Captain Conway

We have made the following allocations of vessels expected to load for the Red Sea during May. In making these allocations we have endeavored to provide an equal distribution as between the two American operators and at the same time provide for the proper spacing of the ships.

Isthmian Steamship Lines

Vessel	*Loading*	*Approx. Date*
Knoxville City	New York	5.11.41
Pres. Buchanan	"	5.19.41
Antinous	"	5.16.41
Montanan	"	5.21.41

Vessel	*Loading*	*Approx. Date*
Wind Rush	New York	5.25.41
West Zeda	"	5.27.41
Alabaman	"	5.30.41
West Hardaway	Phila.	5.18.41
Bienville	"	5.24.41

American Export Lines

Vessel	*Loading*	*Approx. Date*
West Jaffrey	New York	5.16.41
West Nohno	"	5.19.41
Vermont	"	5.23.41
Effingham	"	5.22.41
Kenmor	"	5.24.41
Extavia	"	5.26.41
Aquarius	"	5.31.41
Pan Kraft	"	5.30.41

A copy of this letter is being furnished to American Export Lines and to the Isthmian Steamship Lines, and it is being sent to you in duplicate in the event you wish to give a copy to Mr. Gammie.

Will you please communicate the above information to the owners of the vessels.

Allocations for vessels scheduled for June sailings will be furnished at a later date.

Very truly yours,

(Sgd.) G. H. Helmbold,
Director, Operations and Traffic.

133 Exhibit 16

American-Hawaiian Steamship Co.

New York, May 9, 1941.

M. L. Wilcox, Esq.
Assistant Director, Division of Emergency Shipping
United States Maritime Commission, Washington, D. C.

Dear Mr. Wilcox:

Confirming our telephone conversation this morning.

We have planned a rearrangement of our intercoastal schedules and bookings so that we can make the following steamers available subject to a mutually satisfactory agreement on terms of employment:

S. S. Montanan: Total dead weight about 9,500 tons, bale capacity about 433,000 cubic feet. Expected clear of cargo at Boston, Mass., about May 19.

S. S. Alabaman: Total dead weight about 10,380 tons, bale capacity about 508,000 cubic feet. Expected clear of cargo at Boston, Mass., about May 28.

The speed of both vesse'ls is about 11½ knots, and I enclose copy of their capacity plans which will give you the deck and gear arrangements.

I also enclose copy of our net charter party form. Mr. Seth will call on you Monday morning, May 12, to discass this, and I understand that you will have the form checked over in the meantime.

The following is our understanding of the terms of employment.

Voyage: From one United States Atlantic coast loading port north of Hatteras and not east of New York to not exceeding two ports of discharge in the Red Sea including Aden, but warranted no Suez Canal.

Cargo: Lawful merchandise.

Freight rate: 75 cents net per cubic foot on the bale cargo capacity of each vessel. F. I. O. including all clerking, dunnage, and other port charges.

War-risk insurance: The above rate is predicated on our ability to secure full war-risk coverage at not exceeding a rate of 5 percent for the round voyage on valuations of $1,000,000 for each vessel.

War bonus to ship personnel: The above rate is also predicated on existing basic wage plus emergency increase and war bonus as presently paid in the South and East African trades.

Lay days: Twelve running days reversible, but excluding steaming between discharging ports.

134 Demurrage: $3,000 per day.

Dispatch: $1,500 per day.

On deck cargo: Carriage to be at sole discretion of master and at full risk of owner of cargo. If carried rate to be 60 cents per cubic foot on cubic measurement of such cargo.

Freight: To be fully prepaid without discount in United States currency before vessel's departure from loading port and to be considered as earned and not returnable vessel and or cargo lost or not lost. Payment of dispatch money or demurrage to be made as may be mutually agreed.

All other terms and conditions as per charter party form enclosed.

As I told you on the telephone we will let you know about the two June steamers as early as possible next week. We have two steamers presently under charter to Isthmian which may be redelivered next month and I want to get more accurate information than we now have regarding their probable redelivery dates.

Yours faithfully,

JOHN CUSHING,
President.

TRANSPORT, TRADING & TERMINAL CORPORATION
90 BROAD STREET NEW YORK, N. Y.

NET CHARTER

New York, N. Y., May , 1941

It is this day mutually agreed between American-Hawaiian Steamship Company

Owners of the Steamship "MONTANAN" of 3833 tons net register, classed

American Bureau now trading

and Charterers, as follows:

1.—That the said steamship, being tight, staunch and strong, and in every way fitted for the voyage and according to Builders' scale and plan, which Owners believe to be correct but do not guarantee having 433,297 cubic feet bale space, available for cargo shall load at one U. S. Atlantic Coast port, north of Cape Hatteras, but not east of New York.

according to custom of port, a full and complete cargo of lawful merchandise, which Charterers bind themselves to furnish, and being so loaded shall therewith proceed as ordered when signing Bills of Lading to not exceeding two ports of discharge in the Red Sea, including Aden, but warranted no Suez Canal.

or so near thereunto as she may safely get, and there, always afloat, deliver the cargo as customary, at such wharf dock or other good and safe place as Charterers' Agents may direct on arrival, in accordance with Bills of Lading; in consideration whereof Charterers shall pay the vessel freight as follows:

Seventy-five cents (75¢), U.S. Cy., net, per cu. ft., on the bale cargo capacity, as above stated. For on-deck cargo, Sixty cents (60¢), U.S. Cy., net, per cu. ft. on cubic measurement of such cargo carried. Entire freight to be prepaid, without discount, before vessel's departure from loading port and to be considered as earned and not returnable, vessel and/or cargo lost or not lost.

2.—Steamer to have liberty to sail with or without pilots, and to tow and assist vessels in all situations. Steamer to have liberty to fuel at a port or ports en route.

3.—Charterers to have the privilege of designating wharves, or other good and safe places for loading or discharging. The cargo to be brought to, and taken from along side the Steamer, at Merchants risk and expense. Steamer to supply steam to drive winches, and to give use of gear on board vessel, also to load or discharge at night, on Sundays or holidays or on day when notice is given if required by Charterers such time not counting, they paying all expenses and labor incurred.

4.—Cash for Captain's ordinary disbursements at port of loading to be advanced, if required, Steamer paying two and a half per cent. commission and cost of insurance thereon, the amount of advance to be covered by Captain's draft, payable three days after ship's arrival at port of discharge out of freight and on which the draft shall form a lien.

5.—Charterers are to load, stow, and trim the cargo at their own expense, under the direction of the Master. Charterers to pay all port charges incidental to the outward cargo at loading port or ports, including elevating, stevedore, wharfage and tarpaulins, and to provide and fill sacks required to secure bulk grain, also all necessary dunnage and dunnage mats, if required, and to provide an Agent for Custom House business, but Owners to pay all port and other charges at loading port until steamer arrives at loading berth.

6.—Charterers' Agents to pay cost of discharging cargo, pilotage, and all port charges incidental to their cargo at the discharging port to which Steamer may be ordered and to provide an Agent for the Custom House business, free of commission. All canal tolls to be paid by Charterers.

7.—Charterers to have use of any dunnage or mats, etc., as may be aboard. All dunnage on board on completion of discharge shall be left on board the vessel if the Master so directs and becomes the property of the Owners.

8.—The Steamer shall be consigned to Charterers' Agents at ports of loading and discharge, and shall employ their Broker to attend to the Ship's business free of commission.

9.—The Captain shall sign Bills of Lading or Master's Receipts as and when presented, without prejudice to this Charter-party. Charterers agree to indemnify Owners from all consequences or liabilities that may arise from bills of lading being signed by the Captain or for him or from his otherwise complying with same. The captain, officers and crew of the vessel in supervising loading, stowing, trimming, tallying and discharge of cargo shall be deemed the agents of the Charterers, except in so far as such supervision pertains to the safety of the vessel. The Owners shall not be liable for shortage of cargo unless shown to have resulted from pilferage by the vessel's crew.

10.—Lay days at port of loading to commence on the day following receipt by Charterers' Agents of Captain's written notice of readiness. Should the Steamer not be ready to load on or before noon of , the Charterers have the option of cancelling this Charter party. Lay days at port or ports of discharge to commence on the day following receipt by Charterer's Agents of Captain's written notice of readiness.

11.—If the steamer be not sooner dispatched cargo to be loaded and discharged in a total of twelve (12) running days (Sundays and holidays excepted). Should the cargo not be loaded at loading port or discharged at port of destination within the specified time, for each and every day over and above said lay days, Charterers are to pay, day by day, the sum of Three thousand dollars ($3,000), U.S. Cy. per day demurrage, any detention through Quarantine to Vessel or Cargo not to count in lay days. If sooner dispatched, steamer to pay Fifteen hundred dollars ($1,500), U.S.Cy. for each day saved, lay days allowed for loading and discharging are reversible. Lay days not to include time steaming between ports.

12.—The clauses herein regarding payment of port charges, stevedores, etc., at ports of loading and discharge refer only to such charges as are ordinarily incurred, any extra expenses caused by the steamer being under average, are to be adjusted in the usual way. All spaces to be placed at Charterers' disposal, which would be used for cargo, if loading for owner's account, and where cargo has been carried before.

13.—Throughout this charter party the following are always mutually excepted: The act of God; perils or accidents of the sea; causes beyond the shipowner's control; restraint or interference or compliance with any directions whatsoever by any Government; fire from any cause whatsoever or wheresoever occurring; war, hostilities, rebellion or civil commotion even though existing or anticipated when this charter is made or any bills of lading signed or voyage commenced hereunder; enemies; pirates; riots, strikes, lockouts, stoppage, shortage or lack of labor or labor troubles of the shipowner's employees or others; fault or error in the management or navigation of the vessel; unseaworthiness, latent or other defect even though existing at delivery or beginning of any voyage not resulting, however, from owner's want of due diligence. Notwithstanding anything to the contrary in this charter party, the owner shall be entitled to any exemptions from or limitations of liability afforded by any statute or rule of law for the time being in effect.

14.—If any dispute arises the same to be settled at New York by two Referees, one appointed by the Owners and one by the Charterers or their Agents, and if necessary, the Arbitrators to appoint an Umpire. The decision of the Arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

15.—Owners shall furnish Charterers with a copy of Vessel's scale and plan showing cubic capacities of all holds and spaces upon signing of this Charter party.

136 EXHIBIT 17

May 12, 1941

Mr. John Cushing,

President, American-Hawaiian Steamship Co., New York, N. Y.

Dear Mr. Cushing: Many thanks for your letter of May 9. We have had a thorough discussion of the proposed charter with Mr. Seth and he is returning to New York tonight with a revised charter and a full explanation of the reasons for the changes we have made.

We would appreciate it if you could call us Tuesday morning, advising that the changes are satisfactory to your company.

Yours very truly,

M. L. WILCOX,
Assistant Director, Emergency Shipping.

137 EXHIBIT 18

Washington, D. C., May 13, 1941

M. L. Wilcox,
Assistant Director, Emergency Shipping,
United States Maritime Commission:

Thank you for your letter May 12. As there are certain points in the charter revisions suggested by you which do not seem in accord with our general understanding it seems better to comment by teletype than to attempt to deal with them over the telephone. In order to clarify some of our later suggestions, we start by saying we feel all bills of lading under the charter should be issued by Charterer's agents on their form whether the cargo covered is charterers' or commercial. Our intercoastal forms are not suitable for any other trade. In referring to clause numbers we are using the numbers on our original form and have numbered your suggested clauses form 29 through 32.

Clause 1. We agree two United States Atlantic loading ports north Hatteras but not east Portland.

On discharging ports your suggested range is so broad as to possibly involve many steaming miles beyond total distance we contemplated. In our conversation we took it that the prime intention was Red Sea discharge and that ports beyond were only to be used if this intention could not be carried out. We therefore suggest following modi-

fication "not exceeding two ports of discharge in either but not both of following ranges: 1—Mombasa, Gulf of Aden, and Red Sea ports not beyond the port of Suez. 2—Mombasa, Persian Gulf, Karachi, Bombay. Orders for discharging ports to be given at Capetown."

If charterers' bills of lading are used is it necessary delete "on arrival, in accordance with bills of lading"?

On payment of freight, if the phrase "before vessel's departure from last loading port" is eliminated we would not seem appear to have any agreed protection as obviously a cargo lien would be impractical. Since the total freight is easily ascertainable in advance of loading, would it not be possible to arrange matters so that this phrase could stand? If not, what alternative protection can you suggest?

Clause 3. We agree to addition words "on cargo."

Clause 4. We agree to delete.

Clauses 5 and 6. While customary net form charter provides for payment of all port charges by charterers, we now understand you contemplate owner paying port charges solely for account of vessel and charterer those for account of cargo. We are agreeable to this and willing reword clauses accordingly. What protection would you suggest against exorbitant dockage charges for vessel's account? We understand no possibility Suez Canal tolls being involved.

Clause 7. We agree deletion last sentence.

Clause 8. We agree to naming charterers' agents and feel your other suggestion is covered by our comment on clauses 5 and 6.

Clause 9. If agent is to sign ladings and you insist on deletion second sentence printed clause, would you agree substitute following: "It is understood that neither the vessel nor its owners shall be responsible for shortage, damage, breakage, leakage, shrinkage, or any other condition in respect to the cargo."

Clause 11. We agree 13 lay days Alabaman; 12, Montanan, and to elimination dispatch money, but do feel in view their greater speed and three decks that we should be entitled to somewhat higher demurrage rate than that accorded slower, less suitable vessels—say $3,000 Alabaman and $2,750 Montanan.

Clause 14. This is the customary arbitration clause in all United States charter parties and we feel it should stand unaltered, particularly as Maritime Commission will be a party directly or indirectly to the transaction.

Clause 16. We agree suggested clause re use of deep tank.

Clause 17. If our discharging port suggestion is adopted your addition should be altered to read "in the ranges named above."

Clause 23. As charterers or agents will supply all cargo; this clause should stand as printed.

Clause 25. We feel we must have some protection against violation by parties over whom we will have no direct control but are willing to accept as a substitute any suggestion which will accord us this protection.

Clause 27. We agree change "full" to "the."

Clause 28. We agree eliminate all reference crew bonuses, wages, etc., if you agree that clause with respect war-risk hull insurance shall stand as originally typed, viz, with your reference to savings eliminated.

Clause 29. This appears to refer solely to relationship between charterer or his agent and outside shippers, and if we understand it correctly we feel it should be entirely eliminated as charterer is privileged to load any lawful cargo he chooses.

Clause 30. We agree, and in the instance of these two vessels do not regard the use of our terminal facilities as practical.

Clause 31. We feel this clause should be amended to read "charterers' agents as provided in clause 8 above shall act as agents of owners at loading and discharging ports and owners shall pay for their services at the rate of ¼ cent per bale cubic as above subject to a total maximum of $1,000."

Clause 32. We agree.

We have thought it advisable to give you the reasons for our various suggestions in full and will await your further comments.

JOHN E. CUSHING.

139 EXHIBIT 19

29. Charterer, through booking agent named in Clause 7 has privilege of securing commercial or other lawful cargo to complete ship, fill broken stowage space, or otherwise to enhance the gross revenue for the voyage, such additional revenue less brokerage, if any, and a commission of 5% to the booking agent to be credited to the charterer.

30. Vessel to be berthed in U. S. ports at piers or terminals and to use facilities designated by the charterer and approved by an authorized representative of the U. S. M. C., preference being given to the use of owners terminals and facilities where practical.

31. Charterers have privilege of appointing booking or loading agents in the U. S. approved by the U. S. M. C. but owners not required to pay for this service in excess of ¼¢ per bale cubic as above, subject to a maximum of $1,000.

32. This charter not to become effective until approved by the U. S. M. C.

140 EXHIBIT 20

MAIL AND FILES SECTION,
DIVISION OF EMERGENCY SHIPPING,
May 14, 1941

Teletype.

Mr. John Cushing,
President, American Hawaiian Steamship Co., New York, N. Y.:

Thanks, your teletype, which is helpful. In order clarify position between vessel owner, charterer, who proposed to be British Ministry of Shipping, booking agent, either Isthmian or Export, and shipper of commercial cargo the charter can contain a provision to effect that neither the vessel nor its owners shall be responsible for shortage, damage, breakage, leakage, shrinkage, or any other condition in respect to cargo. Since British Ministry are charterers all space in vessel they can give booking agents authority issue bills of lading on booking agents' form to shippers of commercial cargo. Responsibility of booking agents under bills of lading issued to commercial shippers could be insured through P. & I. arranged by booking agents, premium for which would be deductible from commercial revenue credited to charterers' account—eventually lease-lend. In order reduce this to writing in charter your printed clause 23 should be altered to read, "A regular line bill of lading on booking agent's form to be used and all such bills of lading covering charterers' cargo to be clausedas follows: 'All terms and conditions and exceptions of charter party dated New York . . . are hereby incorporated'." It is understood that bills of lading covering commercial cargo would not carry this clause making them subject to charter party, but additional risk assumed by booking agents for issuance their bills of lading would be covered by P. & I. insurance deductible from commercial freight revenue. Isthmian agreeable to this arrangement and we hope Export will likewise concur.

With respect prepayment of freight can only make observation that British Ministry of Shipping are proposed charterers and that their money for freight charges is com-

ing from Lease-Lend fund. In view this we feel words "before vessel's departure from loading port" should continue deleted.

Clauses 5 and 6. Do not anticipate that there will be any exorbitant dockage charges and if any such charges are made which you feel exorbitant we would appreciate your calling them to our attention and you will have our full support in endeavoring secure adjustment. As far as exorbitant charges loading ports are concerned you have our assurance that such charges will be on reasonable basis.

Reference clause 25, violation of neutrality act, this clause can be reworded to the effect that charterers comply with neutrality act with respect to cargo and suggest wording somewhat as follows, "Charterers shall be responsible for fulfillment of all requirements of Neutrality Act of 1939 of the United States, including any amendments thereof and all proclamations, rules, and regulations thereunder so far as they relate to cargo." Since vessel under your operation, we cannot expect charterers to assume responsibility for observance neutrality act for vessel operation.

141 Reference clause 26, we feel alteration we have made is reasonable and request that it stand. As you know, we are making every effort keep war risk insurance on reasonable levels even to extent of recommending Commission write insurance themselves if necessary to accomplish this purpose.

Clause 29. While strictly not matter between owner and charterer, is clause which should be in to indicate privilege of charterer to secure other cargo. This clause also should be in in order that one document, viz, charter party, can cover all phases of operation with respect transportation and freight.

Clause 31. We believe that this clause as written is fair and do not believe that berthing agents should be called upon to pay for services at discharging ports out of small fee which they will now secure limited to maximum $1,000.

There has been considerable discussion regarding settlement freight in event vessel does not complete intended voyage Red Sea. While the following suggestion is somewhat at variance from original discussions and is patterned along later discussions, we believe it is thoroughly equitable to all parties and other carriers in African and Indian trades. "In the event vessel discharges at a port or ports other than Aden or a port or ports in the Red Sea, freight and other costs shall be adjusted on the basis of conference tariff rates and berth terms applicable to the port or ports

at which the cargo is discharged. In the event the voyage is not completed (and vessel is not lost) and vessel does not discharge at a port or ports, Capetown or beyond, adjustment shall be made on the basis of (dollars (demurrage rates) per day vessel is used by charterer."

The use of this clause will not require alteration of trading range in first section of charter party.

Will appreciate your telephoning your concurrence. Meantime we are taking liberty having charter party printed for purposes covering all vessels Red Sea service by similar agreement.

M. L. WILCOX,
United States Maritime Commission.

142 EXHIBIT 21

AMERICAN HAWAIIAN STEAMSHIP CO.,
New York, May 14, 1941

M. L. Wilcox,
Assistant Director, Emergency Shipping Division,
United States Maritime Commission,
Washington, D. C.

Thanks your teletype date. Unfortunately unable give you a definite reply before tomorrow as cannot reach all of my associates, whom I must consult this afternoon. Meantime would greatly appreciate further clarification your suggested clause re discharging ports. I am not clear whether this means that there would definitely be no combination involving Aden or a Red Sea port as one port of discharge and some other port in the Mombasa/Bombay range as the other. If this is not the intention and such a combination is possible it is difficult to visualize what sort of an adjustment of freight money would be made.

Referring clause 31, are we to understand we are free to make our own arrangements for ship's representation at discharging ports, or are we expected to use representative of the booking agents who handle the vessel at loading ports, making our own deal for their discharging-port compensation? If would greatly assist in our consideration if you would be good enough to let me have the answer to to these two questions by teletype not later than tomorrow morning.

JOHN E. CUSHING.

143 EXHIBIT 22

May 14, 1941

Mr. John Cushing,
President, American Hawaiian Steamship Co., New York, N. Y.

Thanks your teletype 14th. We understand what you endeavoring do is clarify range so that vessel will go either Mombasa, Aden, Red Sea range, or Mombasa, Persian Gulf, Karachi, Bombay range, but will not be required, for example, go Suez, Red Sea, and Basra, Persian Gulf on same voyage without additional compensation. This seems reasonable and we will endeavor work some wording to cover this into proposed charter party. Nicol here this afternoon and suggested some other clarifying changes which are helpful and will be incorporated into proposed charter. Nicol's suggestions are:

Clause 3. Lighterage, if any at discharging port for account of cargo.

Clause 10. Lay days to commence whether vessel in berth or not after reporting readiness.

Clause 16. Delete word "about" in description of deep tanks. He has also suggested alteration of wording regarding usage bill-of-lading form and method of application increase or decrease in war risk, neither of which suggestions alter principles already outlined.

Nicol has likewise suggested deletion first sentence, clause 24, which seems reasonable. Nicol has raised question regarding application rates in event of discharge at other than Aden or Red Sea ports as outlined latter part our teletype 14th. We are endeavoring exact assurance from British that vessels in Red Sea service will proceed to Suez for discharge cargo unless impractical proceed to Suez or other Red Sea port, Aden and beyond. On this basis suggestions we made latter part our teletype 14th regarding tariff rates applicable in event discharge other than Aden or Red Sea ports is question of safety valve only in event Aden and Red Sea closed an application of rates as suggested our teletype believed thoroughly equitable to all parties and other carriers in African and Indian trades. Please let us have your concurrence early Thursday morning so that charter can be rewritten and mimeographed for distribution in time for discussion meeting, Intercoastal Lines, New York, Friday.

M. L. WILCOX,
United States Maritime Commission.

144 EXHIBIT 23

Washington, D. C., May 15, 1941.

American Hawaiian Steamship Co.,
New York, N. Y.

M. L. Wilcox,
Assistant Director Emergency Shipping Division,
United Maritime Commission, Washington, D. C.

Referring to our teletypes of May 13 and 14 and your teletype May 14 and night letter same date. Also our telephone conversation with Mr. King today. Following is our understanding of changes arrived at in printed charter form and typewritten clauses from the original form sent you by us on May 9 and the clauses submitted by you to Mr. Seth on May 12. The numbers used refer to the original numberings which were carried through our subsequent teletype exchanges.

Clause 1: Word "and" in second line we find is typographical error and should be deleted.

Loading ports: "Not more than two United States Atlantic coast ports north of Cape Hatteras but not east of Portland, Maine."

Discharging ports: To cover the point raised by us and acknowledged in your night letter we suggest following: "Not exceeding two ports of discharge in Mombasa, Aden, Red Sea range not beyond Suez or Mombasa, Persian Gulf, Karachi, Bombay Range. Confirmation of discharging ports, as ordered on sailing, to be given on vessel's arrival off Mombasa within 24 hours. If longer detained awaiting orders such additional time to count as lay days.

Payment of Freight: Our suggestion appears at the end of this message.

Clause 2: Stands as printed.

Clause 3: We suggest clarify by changing word "merchants" in second line to "charterers" and insert after word "expense" any litherage necessary at ports of discharge shall be arranged for by charterers and to be at their risk and expense, any custom of the port to the contrary notwithstanding." Insert "on cargo" at end clause.

Clause 4: Entirely deleted.

Clause 5: Insert "top" before "wharfage"; delete "and tarpaulins" delete "and to provide an agent for customhouse business" delete "until steamer arrives at loading berth."

Clause 6: Delete "pilotage" and all of second printed line.

Clause 7: Delete last sentence entirely.

Clause 8: Delete "Free of Commission."

Clause 9: Change "captain" to "agent" delete "or masters receipts" and in lieu therefor insert "in behalf of the master." Delete entire second sentence.

Clause 10: After the word "readiness" in first line insert "whether in berth or not" and after word "readiness" in third line insert "whether in berth or not."

Clause 11: Lay days and demurrage figures to be shown as agreed in blank spaces for respective vessels. Delete "if sooner dispatched steamer to pay ——— for each
145 day saved." Retain after words "lay days reversible" typewritten phrase "lay days not to include time steaming between ports."

Clause 12: Stands as printed.

Clause 13: Stands as printed.

Clause 14: Arbitration clause our suggestions appear at the end of this message.

Clause 15: Stands as printed.

Clause 16: Delete "about" last word in first line. Insert at end printed clause "freight is not payable on the deep tank space unless usable and used for cargo."

Clause 17: Delete "named" before "port" and insert after "discharge" the phrase "in the ranges named above." This to conform to clause 1.

Clause 18: Stands as printed.

Clause 19: Stands as printed.

Clause 20: Stands as printed.

Clause 21: Stands as printed.

Clause 22: Stands as printed.

Clause 23: Rewrite to read as follows: "neither the vessel nor its owners shall be responsible for shortage, damage, breakage, leakage, shrinkage or any other condition in respect to cargo. A regular line form or bill of lading to be used and all such bills of lading covering charterers cargo to be used as follows—all terms, conditions and exceptions of charter party dated New York—are hereby incorporated."

Clause 24: Delete entire first sentence, leave second sentence stand.

Clause 25: Rewrite to read as follows: "Charterers shall be responsible for fulfillment of all the requirements of neutrality act of 1939 of the United States including any amendments thereof and all proclamations, rules and regulations thereunder so far as they relate to cargo."

Clause 26: Stands as printed.

Clause 27: Change "full" to "the."

Clause 28: Rewrite to read as follows: "freight to be paid under this charter is predicated on obtaining war-risk insurance at a rate of 5 percent into the Red Sea on a valuation of $1,000,000. Any increase in this war-risk insurance rate into the Red Sea shall be added to the total freight and any reduction shall be deducted."

Clause 29: We understand from our telegraphic exchanges that this clause is primarily designed to establish relationship of charterer and booking agent and that owner is not concerned with it beyond giving charterer the privilege of securing lawful cargo other than his own. If this understanding is correct we are agreeable to accepting your draft for this clause.

Clause 30: Stands as typewritten re wharfage as our objection has been covered in your teletype May 14.

Clause 31: Rewrite to read as follows: "Charterers agents as provided in clause 8 above shall act as agents of owners at loading and discharging ports. At loading ports owners shall pay for their services at the rate of one-fourth cent per bale cubic foot as above subject to a total maximum of $1,000. At discharging ports the payment shall be $125 for each port of discharge."

Clause 32: Stands as typewritten. We have ex-
146 plained to Mr. King on the telephone our difficulties with and reasons for the following suggestions on clauses where your proposals are not acceptable to us.

Payment of freight: We feel this clause should stand as typewritten in our original form because we have a very definite responsibility to protect our stockholders. However, we realize your problem and if absolutely necessary would agree to delete the words "before vessels departure from last loading port" on the understanding you will make every effort to have charterers work out the mechanics for prompt payment on completion of loading.

Clause 14: We suggest deletion entire clause but if this is not satisfactory would accept the clause if it read: "If any dispute arises same to be settled by the Chairman of the United States Maritime Commission."

Regarding the problem of possible discharge at south African ports, say Capetown, Delagoa Bay range, we do not like the suggestion that conference berth rates be used. We have no knowledge of what the application of these rates would mean and no control over the booking of cargo. The whole transaction differs materially from a usual berth operation. We feel the most satisfactory solution would be provision for an adjustment of the cubic-foot rate in the

charter party, and suggest a reduction of 5 cents per cubic foot if circumstances compel discharge of cargo at port or ports Capetown to Delagoa Bay.

JOHN E. CUSHING.

Corrections: First word next to last line should be "foot" instead of "food." Clause 30 should have read as follows: "Clause 30: Stands as typewritten as our objection re wharfage has been covered in your teletype May 14."

147 EXHIBIT 24

May 15, 1941

UNITED STATES MARITIME COMMISSION
Washington, D. C.

AMERICAN HAWAIIAN STEAMSHIP CO.,
New York, N. Y.

M. L. Wilcox,
Assistant Director, Emergency Shipping Division,
United States Maritime Commission,
Washington, D. C.

In rechecking my teletype date with Nicol he has called my attention to the omission from our clause 23 of a sentence at the end of which he discussed with you yesterday and which reads: "On any cargo other than that of charterers which may be loaded this clause will not appear on the bills of lading, but charterers are to cover liability with a separate protection and indemnity cover." Would appreciate your correcting my teletype accordingly.

J. E. CUSHING.

148 EXHIBIT 25

AMERICAN-HAWAIIAN STEAMSHIP CO.,
New York, May 17, 1941

Memorandum for Mr. A. E. King,
Division of Emergency Shipping,
United States Maritime Commission.

We refer to the meeting yesterday afternoon and particularly to the discussion of the situation which would be created if it was found impossible to discharge at Red Sea or Gulf of Aden ports.

It seemed to us it might be helpful if we drafted some language embodying our understanding of the principle

involved which might tend to clarify the various points raised. We fully appreciate that neither you nor we are definitely committed to the principle at this time and are sure you understand that the subject of rates other than Red Sea, Gulf of Aden rates is also open to further discussion.

Our suggestion is based on the theory that the primary purpose of the charter is a voyage to Red Sea and Gulf of Aden ports, that the injection of the other ranges is not designed to create options for the charterers, but rather as a "safety valve" against certain contingencies which may arise.

On that premise we suggest that the language of clause 1 re discharging ports be rewritten to read:

" * * * shall therewith proceed as ordered on signing bills of lading to not exceeding two ports of discharge in Gulf of Aden and the Red Sea not beyond Suez. Confirmation of discharging ports as ordered on sailing to be given on vessels arrival off Mombasa within 12 hours. If longer detained awaiting order such addi'ional time to count as lay days."

We suggest that the last paragraph of clause 1 be deleted entirely and the following substituted:

"If for reasons beyond the control of the owner the vessel cannot discharge at port or ports in the range named above then on arrival off Mombasa she may be ordered to discharge at not exceeding two ports in any one of the following ranges: Capetown-Delagoa Bay, Persian Gulf, Karachi-Bombay.

"If under these circumstances vessel discharges at port or ports in Capetown-Delagoa Bay range owners shall refund to charterers ——— cents per cubic foot bale space on which original freight was paid.

"If under these circumstances vessel discharges at port or ports in Persian Gulf owners shall refund to charterers ——— cents per cubic foot bale space on which original freight was paid.

"Vessel shall not be required to discharge in more than one range."

If this language or similar language is adopted, then clause 15 of the charter party form submitted by the Commission should be entirely deleted.

J. E. Cushing,
President.

149 EXHIBIT 26

New York, May 19, 1941.

A. E. King,
United States Maritime Commission,
Department of Commerce Building,
Washington, D. C.

While further reviewing proposed charter agreement thought occurs to us that by reason difference phraseology of the several owners ladings and protection and indemnity insurance policies that it very difficult to embody proper clauses in the charter agreement and I take liberty suggesting for your consideration the preparation of a lading to use in all instances of steamers operating under your form of agreement and which lading will embody the respective liabilities and pertinent clauses therein provided.

OLIVER P. CALDWELL.

150 EXHIBIT 27

New York, May 19, 1941

A. E. King,
Emergency Shipping, United States
Maritime Commission,
Washington, D. C.

Pursuant Friday understanding lines meeting tomorow morning but as yet have no advice from you on agreement questions discussed Friday.

HARRY S. BROWN.

151 EXHIBIT 28

May 20, 1941

Mr. H. S. Brown,
Intercoastal Steamship Freight Association,
New York, N. Y.

Dear Mr. Brown:

We are sending you herewith 24 copies of the draft of charter for vessels to be used in the Red Sea service in accordance with our discussions with members of your association and other intercoastal operators Friday, May 16.

We have given careful consideration to all the points raised by various owners in our discussions and have embodied in this draft all changes deem consistent with or pertinent to the operation required.

commission.

9.—The Captain shall sign Bills of Lading or Master's Receipts as and when presented, without prejudice to this Charter-party. Charterers agree to indemnify Owners from all consequences or liabilities that may arise from bills of lading being signed by the Captain or for him or from his otherwise complying with same. The captain, officers and crew of the vessel in supervising loading, stowing, trimming, tallying and discharge of cargo shall be deemed the agents of the Charterers, except in so far as such supervision pertains to the safety of the vessel. The Owners shall not be liable for shortage of cargo unless shown to have resulted from pilferage by the vessel's crew.

10.—Lay days at port of loading to commence on the day following receipt by Charterers' Agents of Captain's written notice of readiness. Should the Steamer not be ready to load on or before noon of ....., the Charterers have the option of cancelling this Charter-party. Lay days at port or ports of discharge to commence on the day following receipt by Charterer's Agents of Captain's written notice of readiness.

11.—If the steamer be not sooner dispatched cargo to be loaded and discharged in a total of twelve (12) running days (Sundays and holidays excepted). Should the cargo not be loaded at loading port or discharged at port of destination within the specified time, for each and every day over and above said lay days, Charterers are to pay, day by day, the sum of Three thousand dollars ($3,000), U.S. Cy. per day demurrage, any detention through Quarantine to Vessel or Cargo not to count in lay days. If sooner dispatched, steamer to pay Fifteen hundred dollars ($1,500), U.S.Cy. for each day saved, lay days allowed for loading and discharging are reversible. Lay days not to include time steaming between ports.

12.—The clauses herein regarding payment of port charges, stevedores, etc., at ports of loading and discharge refer only to such charges as are ordinarily incurred, any extra expenses caused by the steamer being under average, are to be adjusted in the usual way. All spaces to be placed at Charterers' disposal, which would be used for cargo, if loading for owner's account, and where cargo has been carried before.

13.—Throughout this charter-party the following are always mutually excepted: The act of God; perils or accidents of the sea; causes beyond the shipowner's control; restraint or interference or compliance with any directions whatsoever by any Government; fire from any cause whatsoever or wheresoever occurring; war, hostilities, rebellion or civil commotion even though existing or anticipated when this charter is made or any bills of lading signed or voyage commenced hereunder; enemies; pirates; riots, strikes, lockouts, stoppage, shortage or lack of labor or labor troubles of the shipowner's employees or others; fault or error in the management or navigation of the vessel; unseaworthiness, latent or other defect even though existing at delivery or beginning of any voyage not resulting, however, from owner's want of due diligence. Notwithstanding anything to the contrary in this charter-party, the owner shall be entitled to any exemptions from or limitations of liability afforded by any statute or rule of law for the time being in effect.

14.—If any dispute arises the same to be settled at New York by two Referees, one appointed by the Owners and one by the Charterers or their Agents, and if necessary, the Arbitrators to appoint an Umpire. The decision of the Arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

15.—Owners shall furnish Charterers with a copy of Vessel's scale and plan showing cubic capacities of all holds and spaces upon signing of this Charter-party.

16.—The bale capacity of 433,297 cubic feet according to builder's plan ~~includes deep tank with a total bale capacity of about ..... cubic feet~~ does not include deep tank, which is used for bunkers.

17.—If conditions at named port of discharge are unfavorable for prompt dispatch, Charterers shall have the privilege of ordering the vessel to discharge at other port or ports, in which case the total freight mentioned herein shall be increased by an amount in proportion to the added service performed.

18.—If deeptank is used Charterers are to clean same at their expense to put deeptank in satisfactory condition.

19.—This charter-party includes, and all bills of lading issued hereunder shall include Chamber of Shipping War Clauses 1/2/3 August 1937:—

WAR RISKS CLAUSE

"1. The Master shall not be required or bound to proceed to any blockaded port or for any port which the Master or Owners in his or their discretion consider dangerous or impossible to enter or reach nor to sign bills of lading for any such port.

"2. (a) If any port of discharge named in this charter-party or to which the vessel may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or

"(b) if owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law (a) entry to any such port or discharge of cargo intended for any such port be considered by the Master or Owners in his or their discretion dangerous or prohibited or (b) it be considered by the Master or Owners in his or their discretion dangerous or impossible for the vessel to reach such discharging port—

the cargo or such part of it as may be affected shall be discharged at any other safe port in the vicinity of the said port of discharge as may be ordered by the Charterers (provided such other port is not blockaded or that entry thereto or discharge of cargo therein is not in the Master's or Owners' discretion dangerous or prohibited). If no such orders be received from the Charterers within 48 hours after they or their agents have received from the Owners a request for the nomination of a substitute discharging port, the Owners shall then be at liberty to discharge the cargo at any safe port which they or the Master may in their or his discretion decide on and such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment so far as cargo so discharged is concerned. In the event of cargo being discharged at any such other port the Owners shall be entitled to freight as if the discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses.

"3. The vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destination, zones, waters, delivery or in any other wise whatsoever given by the government of the nation under whose flag the vessel sails or any other government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation.

"If by reason of or in compliance with any such direction or recommendation the vessel does not proceed to the port or ports originally designated or to which she may have been ordered pursuant to the terms of the Bills of Lading, the vessel may proceed to any safe port which the Master or Owners in his or their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment and the Owners shall be entitled to freight as if discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses."

20.—This charter-party includes, and all bills of lading issued hereunder shall include the New Jason Clause reading:—

"In the event of accident, danger, damage or disaster before or after commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the shipowner is not responsible, by statute or contract or otherwise, the shippers, consignees or owners of the cargo shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo."

General average, if any, to be according to York Antwerp Rules, 1924, Rule F, 1/15 inclusive and 17/22 inclusive. Owners shall be entitled to appoint General Average adjusters.

21.—This charter-party includes, and all bills of lading issued hereunder shall include the Both-to-Blame Collision Clause reading:—

"If the shipowner shall have exercised due diligence to make the ship seaworthy and properly manned, equipped and supplied, it is hereby agreed that in the event of the ship coming into collision with another ship as a result of the negligent navigation of both ships, the owners of the cargo carried under this Bill of Lading will indemnify the shipowner against all liability to the other ship or her owners in so far as such liability represents loss, damage or claim of said cargo paid or payable by the other ship or her owners to the said cargo owners and set off, recouped or recovered by the other ship or her owners as part of their claim against the carrying ship or shipowner."

22.—This charter-party includes, and all bills of lading issued hereunder shall include the Clause Paramount reading:—

CARRIAGE OF GOODS BY SEA ACT OF 1936

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

23.—A regular line form bill of lading to be used and all such bills of lading to be claused as follows:—

"All terms, conditions and exceptions of charter-party dated New York, ... May , 1941 , are hereby incorporated."

24.—Charterers shall be exclusively responsible for proper loading, stowage and discharge of explosives, dangerous or injurious goods, and shall comply with all applicable regulations and furnish any necessary fittings.

Charterers to comply with all Government regulations relating to loading, stowage and discharge of dangerous cargo.

25.—Charterers shall be exclusively responsible for fulfillment of all requirements of the Neutrality Act of 1939, of the United States (including any amendments thereof) and all proclamations, rules and regulations thereunder, to be observed on the part of the vessel or in connection with her operation.

26.—Penalty for non-performance of this agreement to be proven damages, not exceeding amount of freight.

civil commotion even though existing or anticipated when this charter is made or any bills of lading signed or voyage commenced hereunder; enemies; pirates; riots, strikes, lockouts, stoppage, shortage or lack of labor or labor troubles of the shipowner's employees or others; fault or error in the management or navigation of the vessel; unseaworthiness, latent or other defect even though existing at delivery or beginning of any voyage not resulting, however, from owner's want of due diligence. Notwithstanding anything to the contrary in this charter-party, the owner shall be entitled to any exemptions from or limitations of liability afforded by any statute or rule of law for the time being in effect.

14.—If any dispute arises the same to be settled at New York by two Referees, one appointed by the Owners and one by the Charterers or their Agents, and if necessary, the Arbitrators to appoint an Umpire. The decision of the Arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

15.—Owners shall furnish Charterers with a copy of Vessel's scale and plan showing cubic capacities of all holds and spaces upon signing of this Charter-party.

16.—The bale capacity of 433,297 cubic feet according to builder's plan ~~includes deep tank with a total bale capacity of about ..... cubic feet~~ does not include deep tank, which is used for bunkers.

17.—If conditions at named port of discharge are unfavorable for prompt dispatch, Charterers shall have the privilege of ordering the vessel to discharge at other port or ports, in which case the total freight mentioned herein shall be increased by an amount in proportion to the added service performed.

18.—If deeptank is used Charterers are to clean same at their expense to put deeptank in satisfactory condition.

19.—This charter-party includes, and all bills of lading issued hereunder shall include Chamber of Shipping War Clauses 1/2/3 August 1937:—

WAR RISKS CLAUSE

"1. The Master shall not be required or bound to proceed to any blockaded port or for any port which the Master or Owners in his or their discretion consider dangerous or impossible to enter or reach nor to sign bills of lading for any such port.

"2. (a) If any port of discharge named in this charter-party or to which the vessel may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or

"(b) if owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law (a) entry to any such port or discharge of cargo intended for any such port be considered by the Master or Owners in his or their discretion dangerous or prohibited or (b) it be considered by the Master or Owners in his or their discretion dangerous or impossible for the vessel to reach such discharging port—

the cargo or such part of it as may be affected shall be discharged at any other safe port in the vicinity of the said port of discharge as may be ordered by the Charterers (provided such other port is not blockaded or that entry thereto or discharge of cargo therein is not in the Master's or Owners' discretion dangerous or prohibited). If no such orders be received from the Charterers within 48 hours after they or their agents have received from the Owners a request for the nomination of a substitute discharging port, the Owners shall then be at liberty to discharge the cargo at any safe port which they or the Master may in their or his discretion decide on and such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment so far as cargo so discharged is concerned. In the event of cargo being discharged at any such other port the Owners shall be entitled to freight as if the discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses.

"3. The vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destination, zones, waters, delivery or in any other wise whatsoever given by the government of the nation under whose flag the vessel sails or any other government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation.

"If by reason of or in compliance with any such direction or recommendation the vessel does not proceed to the port or ports originally designated or to which she may have been ordered pursuant to the terms of the Bills of Lading, the vessel may proceed to any safe port which the Master or Owners in his or their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment and the Owners shall be entitled to freight as if discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses."

20.—This charter-party includes, and all bills of lading issued hereunder shall include the New Jason Clause reading:—

"In the event of accident, danger, damage or disaster before or after commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the shipowner is not responsible, by statute or contract or otherwise, the shippers, consignees or owners of the cargo shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo."

General average, if any, to be according to York-Antwerp Rules, 1924, Rule F, 1/15 inclusive and 17/22 inclusive. Owners shall be entitled to appoint General Average adjusters.

21.—This charter-party includes, and all bills of lading issued hereunder shall include the Both-to-Blame Collision Clause reading:—

"If the shipowner shall have exercised due diligence to make the ship seaworthy and properly manned, equipped and supplied, it is hereby agreed that in the event of the ship coming into collision with another ship as a result of the negligent navigation of both ships, the owners of the cargo carried under this Bill of Lading will indemnify the shipowner against all liability to the other ship or her owners in so far as such liability represents loss, damage or claim of said cargo paid or payable by the other ship or her owners to the said cargo owners and set off, recouped or recovered by the other ship or her owners as part of their claim against the carrying ship or shipowner."

22.—This charter-party includes, and all bills of lading issued hereunder shall include the Clause Paramount reading:—

CARRIAGE OF GOODS BY SEA ACT OF 1936

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

23.—A regular line form bill of lading to be used and all such bills of lading to be claused as follows:—

"All terms, conditions and exceptions of charter-party dated New York, ... May , 1941 , are hereby incorporated."

24.—Charterers shall be exclusively responsible for proper loading, stowage and discharge of explosives, dangerous or injurious goods, and shall comply with all applicable regulations and furnish any necessary fittings.

Charterers to comply with all Government regulations relating to loading, stowage and discharge of dangerous cargo.

25.—Charterers shall be exclusively responsible for fulfillment of all requirements of the Neutrality Act of 1939, of the United States (including any amendments thereof) and all proclamations, rules and regulations thereunder, to be observed on the part of the vessel or in connection with her operation.

26.—Penalty for non-performance of this agreement to be proven damages, not exceeding amount of freight.

27. On-deck cargo to be carried at sole discretion of Master and at full risk of Charterers and/or Owners of such cargo.

28. The freight to be paid under this charter is calculated on the basis of obtaining war risk insurance at a rate of 5% on a valuation of $1,000,000, also wages, emergency wages, war bonus, insurance on lives and personal effects of officers and crew presently paid in the trade to South and East Africa. Any increase in these expenses to be added to the total freight to be paid under this charter.

Our review of the earnings of berth operators serving the alternate ranges provided in clause 1 has resulted in the determination that the justifiable rates to these ranges are——

Capetown-Mombasa, 45 cents cubic-foot bale space f.i.o.
Karachi-Bombay, 50 cents cubic-foot bale space f.i.o.
Persian Gulf, 55 cents cubic-foot bale space f.i.o.

We have confirmed that the British Ministry of War Transport may be the charterer. However, we are unable to state today that this will be so inasmuch as there are certain details yet to be discussed by us with the British Ministry of War Transport.

It is our expectation that the charter draft per enclosures will be finally approved by the Commission Thursday, May 22, and that it will then be possible to immediately conclude charter as between the various owners and the British Ministry of War Transport. Meantime, the draft together with the other information contained in this letter will furnish the information we promised to have available for the meeting of your association and other intercoastal operators to be held May 21.

The other question discussed at the meeting last Friday afternoon related to the status of intercoastal operators withdrawing tonnage from this trade and of the effect such action might have on their future position in the trade under the Transportation Act of 1940 and rules and regulations of the Interstate Commerce Commission thereunder. In this connection, please inform all lines it is our intention to make specific written requests for transfer to overseas service of each of the intercoastal vessels so transferred pursuant to our verbal request. This will assist the owners to protect their status in the intercoastal trade pend-

152 ing passage of legislation or other formal action.

Very truly yours,

A. E. KING,
Division of Emergency Shipping.

153 EXHIBIT 29

A. E. King,
Emergency Shipping, United States
Maritime Commission,
Washington, D. C.

For purposes of clarification and to avoid possible subsequent disputes believe following changes in contract should be made: in last line, article 20, change "the" to "owner's."

On page 1 make separate paragraph of sentence beginning with "entire" now appearing in paragraph dealing only with deck cargo. Add end of article 4 "including ship personnel overtime" and take out of this article "such time not counting," latter words appearing in conflict with provision for running days article 11. In article 3 give steamer liberty "to call at any port or ports en route, or not, for fuel and/or supplies" which understand is regularly given in all British charter forms. Delete article 2 leaving Maritime Commission to arbitrate.

HARRY S. BROWN.

154 EXHIBIT 30

(Western Union—Telegram)

May 21, 1941 5:15 PM RAN:EB.

A E King
Emergency Shipping Division
U S Maritime Commission
Washington D C

With Reference Proposed Voyage Vermont to Red Sea am Advised Today that Cargo Will Include Certain Tonnage Loaded Bombs and Airplanes With Destination Ports as Per Charter Party Some of Which Are Belligerent Question Arises as to Whether This Is Lawful Merchandise Under Terms of Neutrality Act and Proclamations of President Making It Unlawful to Transport Implements of War to Belligerents Is There Anything Being Dome to Clear Any Doubts There May Be as to the Lawfulness of Such Carrying by an American Vessel.

R. A. NICOL.

155 EXHIBIT 31

May 21, 1941

To: Mr. G. H. Helmbold, Director, Operations and Traffic
From: A. E. King
Subject: Vessels to be used in Red Sea service.

Herewith for your information copy of our letter of May 20 to Mr. H. S. Brown, chairman, Intercoastal Steamship Freight Association, New York, is attached. The draft of charter for vessels in the Red Sea service mentioned in this letter to Mr. Brown will, of course, be identical for all ships placed in the Red Sea service whether owned by intercoastal operators or otherwise. We understand you will clear the draft of charter with the general counsel today

and arrange for submission to the Commission to enable them to take action thereon at the meeting May 22.

It is most desirable that this be done as the various operators whose vessels have already loaded or are now loading are anxious to have definite knowledge of the form of contract under which their vessels are performing and particularly they wish to know with whom their charters are to be concluded.

A. E. KING.

156–157 EXHIBIT 32

United States of America

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

WASHINGTON, *September 29, 1950.*

I hereby certify that the annexed is a true copy of an extract from the minutes of a meeting of the United States Maritime Commission held May 23, 1941, relative to Red Sea Service, as shown by the official minutes of the United States Maritime Commission on file in the Department of Commerce, Maritime Administration.

In witness whereof, I have hereunto set my hand, on the day and year first above written.

[SEAL] R. L. MCDONALD,
Secretary, Department of Commerce,
Maritime Administration.

Procedure in connection with vessels in Red Sea Service—Form of charter between owners and British Ministry of War Transport.

There was presented the following memorandum dated May 21, 1941, from the Director, Operations and Traffic:

"'Subject: *Red Sea Service*

"Pursuant to the direction of President Roosevelt to the Chairman on April 30, 1941, the Division of Emergency Shipping has thus far arranged for the employment of about 43 United States flag vessels in service to the Red Sea. It is expected that approximately 12 or 15 vessels will sail during the present month and about 25 during June.

"The vessels in question are owned by a number of companies normally engaged in trade elsewhere than to the Red Sea. In order to concentrate the operations in as few

hands as possible, we have arranged for the vessels to be loaded by the berth operators—in this case, American Export Lines and Isthmian Steamship Lines. The vessels will be spotted and loaded under the supervision of one or the other of these companies who will also book any commercial cargo for which space may be available.

"Our plans call for the execution of a space charter between the vessel owners and the British Ministry of War Transport. A copy of the proposed form of charter is attached. It provides that the owner of the vessel will receive 75¢ per cubic foot on the total bale cargo capacity of his vessel and, if any cargo is carried on deck, 60¢ per cubic foot on actual measurement of such cargo. Out of this, the owner must pay all expenses of the voyage (except cargo expense for loading; discharging expense abroad being assumed by the British Government), including an agency fee to the berth operator of 1/4¢ per bale cubic foot, not to exceed $1,000. The berth operator will book such commercial cargo as may be available and necessary to fill out the space not used by the British Ministry of War Transport, and, on this, he receives a commission of 5% which is, of course, deductible from the revenue. For example, on a vessel with 400,000 cubic feet of bale cargo space and no cargo carried on deck, the vessel owner will be paid $300,000 for the voyage to Suez; the agent will receive $1,000 as an agency fee and, if commercial cargo with a total revenue of, say, $75,000 is booked by him, he will also obtain $3,750 in commission.

"The British Ministry of War Transport will secure reimbursement for the amounts paid to the vessel owner and for the amounts paid for loading British cargo on the vessel (which is not included in the above-mentioned charter rate) from Lease-Lend funds. In the example cited above, they will secure $300,000 plus the loading expense of British Ministry cargo less the net revenue secured from commercial cargo after deduction of cargo handling expense, agents commissions, etc.

"The loading operations of the United States flag vessels involved in this program will take place at New York and Philadelphia. At New York, the American Export Lines and Isthmian Steamship Lines have arranged to lease adjoining piers at Staten Island under a guar-
158 antee of rental by the British Ministry of War Transport. The project should, however, be self-liquidating as vessels occupying the piers will be charged for wharfage which is an expense of the vessel owner payable out of charter hire. This arrangement will facilitate cargo

handling in the port of New York and make a more flexible operation. To guard against congestion in the port, however, and reduce the necessity for tying up lighters and car floating equipment in New York, the port of Philadelphia will also be used to whatever extent may be necessary.

"While all of these vessels are expected to clear for Suez, conditions at that port may render advisable discharge at some other port in the range between Capetown and Bombay and the charter makes provision for this as well as for rate adjustments in such an eventuality. Upon completion of discharge of the outward cargo, the charter terminates and the vessel is open for other employment homeward to the best advantage, depending upon our particular needs for transportation at that time.

"*Recommendation:*

"It is recommended that the Commission approve the aforesaid procedure, including the form of charter.

(Signed) G. H. HELMBOLD,
Director, Operations and Traffic.

We concur:

(Signed) M. L. WILCOX
Division of Emergency Shipping
(Signed) DAVID E. SCOLL
Assistant to Commissioner Vickery
(Signed) WM. U. KIRSCH *
Budget Officer

No legal objection to procedure as modified by Budget Officer but form of charter is not satisfactory. It is suggested that matter be referred to Legal Division for preparation of charter, and, if charter must be executed immediately, require that it be subject to modification in accordance with form of charter ultimately approved by Commission.

(Signed) CARL F. FARBACH,
General Counsel"

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* Approved only with understanding that no payments are to be made direct to British Ministry of War Transport. The Commission should pay charter hire direct to owners from allocated lease-lend funds. The berth operator should remit direct to Commission, as a credit to lease-lend funds, freight revenue collections on commercial cargoes less commissions and cargo loading expenses.

(Signed) WM. U. KIRSCH.

The form of charter referred to in the foregoing memorandum is in the files of the Secretary.

After discussion, by the "yea" vote of Chairman Land and Commissioners Macauley and Woodward, the recommendation contained in the foregoing memorandum was approved with the modifications as set forth by the Budget Officer and the General Counsel, and the proper officers of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect.

159 EXHIBIT 33

1941 May 23 PM 2 03

Mr. R. A. Nicol, R. A. Nicol Co.,
17 Battery Place NYC (BN)——

Yt 21 Vermont Are Informed Clearing for Suez Egypt Is Not Belligerent Refer you Order No. 116 Page 2505 Federal Regisier May 21 Relative Foreign Clearances—A. E. King Division of Emergency Shipping, U. S. Maritime Commission.

160 EXHIBIT 34

May 23, 1941 11:10 AM RAN:EB.

A. E. King
Emergency Shipping Division
U. S. Maritime Commission
Washington, D. C.

Red Sea Business Steamer Vermont Tenders to Export Steamship Designated Agents at New York Today Texas Expected Ready June First Fifth Illinois About June Twentieth William L. Thompson About June Twenty Fifth Please Advise Ports Loading and Loading Agents These Three Ships

R. A. NICOL.

161 EXHIBIT 35

R. A. Nicol R. A. Nicol Co.
17 Battery Place NYK——

YTD Full Information Respecting June Steamers Will Be Transmitted to You Not Later Than Monday—A. E. King U.S. Martime Commission.

162 EXHIBIT 36

May 24, 1941.

Via Air Mail

States Steamship Company
810 Porter Building
Portland, Oregon

GENTLEMEN:

The President of the United States, pursuant to provisions of Public Laws Nos. 11 and 23 (77th Congress) has directed the United States Maritime Commission to acquire for national defense purposes, the services of at least 2,000,000 tons of merchant shipping and to make such cargo space immediately effective in accomplishing the objectives of national defense.

In accordance with the President's directive you are requested, upon arrival of the SS Vermont at her last North Atlantic port on or about May 13, to discharge all cargo and not to load any further cargo on said vessel preparatory to making the vessel available for accomplishing the objectives of national defense (details of which will be given you later) under the provisions of said Public Laws Nos. 11 and 23.

Yours very truly,

(Signed) H. HARRIS ROBSON,
Director, Emergency Shipping.

163 EXHIBIT 37

May 24, 1941.

Captain Granville Conway
District Manager
U. S. Maritime Commission
New York, New York

Dear Captain Conway:

Please refer to our letters of May 16 and May 20 and our conversation of this morning in reference to the allocation of vessels for the Red Sea service.

The allocations set forth in these letters are not changed except that the West Zeda should be nominated for loading at Philadelphia in lieu of the Bienville and the latter loaded at New York.

We give you hereunder a summary of the assignments to be made for June sailings of vessels in this service. There may be some vessels listed in our letter of May 16 scheduled for May sailing which will not get out until June, but we are not repeating them hereunder.

Isthmian S/S Co.

Vessel	*Loading*	*Approx. date*
Columbian	N.Y.	6/8
West Ira	Phila.	6/9
Marymar	N.Y.	6/11
Steel Inventor	N.Y.	6/13
Edwin Christenson	N.Y.	6/15
Flomar	N.Y.	6/19
Kentuckian	N.Y.	6/22
Illinois	Phila.	6/25

American Export Lines

Vessel	*Loading*	*Approx. date*
Texas	Phila.	6/4
Walter A. Luckenbach	N.Y.	6/6
Cranford	N.Y.	6/10
Aquarius	Phila.	6/12
Robert Luckenbach	N.Y.	6/13
West Durfee	Phila.	6/15
Pres. Johnson	N.Y.	6/24
Wm. L. Thompson	N.Y.	6/24
Lewis Luckenbach	N.Y.	6/28

A copy of this letter is being furnished to American Export Lines and Isthmian Steamship Company.

Will you please communicate the above information to the owners of the vessels in question and also to Mr. Gammie of the British Ministry of War Transport.

Very truly yours,

(Signed) G. H. HELMBOLD,
Director, Operations and Traffic.

164 EXHIBIT 38

May 28, 1941.

Mr. R. A. Nicol
States Steamship Company
17 Battery Place
New York, N. Y.

Dear Mr. Nicol:

Unfortunately I was unable to get clearance on a few points which involved the Commission so that I am unable to give you full instructions regarding the Red Sea charters.

There are attached, however, copies of the form of charter in its completed state and I will endeavor to write you further concerning the matter tomorrow.

Very truly yours,

(Signed) G. H. HELMBOLD,
Director, Operations and Traffic.

Attachments.

165–166 EXHIBIT 39

United States of America

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

WASHINGTON, *September 29, 1950.*

I hereby certify that the annexed is a true copy of an extract from the minutes of a meeting of the United States Maritime Commission held May 29, 1941 (1st Session), relative to Red Sea Service, as shown by the official minutes of the United States Maritime Commission on file in the Department of Commerce, Maritime Administration.

In witness whereof, I have hereunto set my hand, on the day and year first above written.

[SEAL] R. L. MCDONALD,
Secretary, Department of Commerce,
Maritime Administration.

Extract From Minutes of Meeting of U. S. Maritime Commission

May 29, 1941.
(1st Session)
(Con.-17)

• • • • • • •

Red Sea Service—Form of charter between vessel owners and British Ministry of War Transport.

There was presented the following memorandum dated May 28, 1941, from the Director, Operations and Traffic:

"Subject: *Charters—Red Sea Service*

"Supplementing our memorandum of May 21, the attached form of charter has been prepared for execution between the owners of the respective vessels assigned to this service and the British Ministry of War Transport and has been cleared by myself and Mr. Goertner, Assistant General Counsel, under authorization of the General Counsel, in accordance with the action of the Commission of May 23.

"In order to facilitate approval of the specific charters under Clause 26 thereof without reference to the Commission it is necessary that the Commission under appropriate instructions as to the filling in of blanks authorize such approval on behalf of the Commission by (1) the Director of Operations and Traffic, or (2) the District Manager at New York upon telegraphic or telephonic instructions of the Director of Operations and Traffic.

"The requirements as to the filling in of blanks are as follows:

1. The total bale capacity to be set forth in paragraph 1 of the charter and the total bale capacity and the deep tank bale capacity to be filled in in Article 15 of the charter shall be in accordance with Certificate of a Measurer of the Treasury Department. If such Certificate cannot be obtained prior to the execution of the charter, approval may still be given but subject to vertification of bale capacity by the Commission.

2. The figure for the adjustment of freight to be inserted in paragraph 2 and the demurrage rate to be inserted in paragraph 11 shall be in accordance with the formula annexed hereto. The determination as to the deadweight tonnage of the vessel is to be made either by the Director of Operations and Traffic or the New York District Manager.

3. The lay days to be inserted in paragraph 11 are also to be determined under the annexed formula and in accordance with the bale cubic capacity determined as in paragraph 1 including deep tank bale capacity only if usable.

167 4. There may be inserted in Article 24 a figure for insurance valuation for war risk insurance purposes not in excess of $100.00 per deadweight ton, the deadweight tonnage to be determined as in paragraph 2. If a higher valuation is agreed upon between the parties specific approval for the insertion thereof must be obtained from the Commission.

"Some of the vessels being chartered for this operation may be subject to mortgages held by the Commission. It is recommended that the approval of the charter in the manner hereinbefore recited shall constitute a consent to such charter under the terms of any Commission mortgage on the vessel.

"It is also necessary that these charters be approved under the provisions of Sections 9 and 37 of the Shipping Act 1916, as amended.

"A resolution authorizing the approval of these charters along the lines of this memorandum will be prepared by the Director of Operations and Traffic and the Legal Division and submitted to the Commission in connection with this memorandum if possible, or if time does not permit, permission is requested that this resolution be handled by notation tomorrow.

"There will also be prepared a blanket Order under Sections 9 and 37 of the Shipping Act 1916, as amended, listing the vessels affected and approving their charter to the British Ministry of War Transport, which if not presented at the meeting it is requested be handled by notation.

(Signed) G. H. HELMBOLD,
Director, Operations and Traffic.

We concur:

(Signed) M. L. WILCOX
Division of Emergency Shipping

No legal objection:

(Signed) FRANCIS B. GOERTNER
Assistant General Counsel"

A copy of the proposed form of Charter referred to in the foregoing memorandum is in the files of the Secretary.

The formula referred to in the foregoing memorandum relative to figure for adjustment of freight, demurrage rates, and lay days is quoted in the minutes of the Special Meeting held May 29, 1941.

In connection with the foregoing matter, there was also presented the following memorandum dated May 29, 1941, from Assistant General Counsel Goertner:

"Subject: *Red Sea Charter*

"In indicating 'No legal objection' to the memorandum of the Director, Operations & Traffic, being submitted to the Commission today, I do so with the express understanding that the procedure outlined in the memorandum and the form of charter attached thereto will be used for privately-owned vessels. Commission-owned vessels require different treatment since the space charters between the operator and the British Ministry of War Transport must be keyed into the underlying charter between the Commission and the operator.

168 "With respect to the provision of the memorandum that approval of the charter shall constitute consent under the terms of any mortgage held by the Commission on the vessel, I think it would be wise to insert the following qualifications: 'Provided that the Di-

rector, Division of Insurance, advise the Division of Operations and Traffic that the insurance coverage is satisfactory'. In this connection, the Director of the Division of Insurance should satisfy himself that the amount inserted for war risk insurance purposes is at least equal to the Commission's mortgage interest. In the case of any vessel of American President Lines, Ltd., the war risk insurance should be not less than the sum of the release price of the vessel from the joint mortgage held by the Commission and the Reconstruction Finance Corporation, plus the principal amount of the notes held by the Commission and secured by said vessel.

(Signed) FRANCIS B. GOERTNER,
Assistant General Counsel"

After discussion, by the unanimous "yea" vote of the members of the Commission present, the recommendation contained in the foregoing memorandum from the Director, Operations and Traffic was approved subject to modifications suggested by Assistant General Counsel Goertner in the foregoing memorandum dated May 29, 1941.

The proper officers of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect.

169–170 EXHIBIT 40

United States of America

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

WASHINGTON, *September 29, 1950.*

I hereby certify that the annexed is a true copy of an extract from the minutes of a meeting of the United States Maritime Commission held May 29, 1941 (2nd Session), relative to Red Sea Service, as shown by the official minutes of the United States Maritime Commission on file in the Department of Commerce, Maritime Administration.

In witness whereof, I have hereunto set my hand, on the day and year first above written.

[SEAL] R. L. MCDONALD,
Secretary, Department of Commerce,
Maritime Administration.

Approval of charter of privately-owned American flag vessels to the British Ministry of War Transport—Red Sea Service.

In connection with the action taken at the morning meeting, relative to charters for the Red Sea Service, there was presented the following proposed resolution:

"RESOLVED, FIRST, that the form of chapter annexed hereto be, and the same is hereby approved, for use by private owners of American-flag vessels in chartering their vessels to the British Ministry of War Transport, under arrangements heretofore made in cooperation with the Commission or which may hereafter be so made, for the utilization of these vessels for one outward voyage within the trading limits specified in said form of charter:

"RESOLVED, SECOND, that approval of specific charters under Clause 28 thereof with respect to voyages thereunder, now or hereafter arranged for by the Commission, may be given on behalf of the Commission by (1) the Director of Operations & Traffic, or (2) the District Manager at New York, by telegraphic or telephonic instructions of the Director of Operations & Traffic, subject to the following requirements as to the filling in of blanks:

1. The total bale capacity to be set forth in paragraph 1 of the charter and the total bale capacity and the deep tank bale capacity to be filled in in Article 15 of the charter shall be in accordance with Certificate of a Measurer of the Treasury Department. If such Certificate cannot be obtained prior to the execution of the charter, approval may still be given but subject to verification of bale capacity by the Commission.

2. The figure for the adjustment of freight to be inserted in paragraph 2 and the demurrage rate to be inserted in paragraph 11 shall be in accordance with the formula annexed hereto. The determination as to the deadweight tonnage of the vessel is to to be made either by the Director of Operations and Traffic or the New York District Manager.

3. The lay days to be inserted in paragraph 11 are also to be determined under the annexed formula and in accordance with the bale cubic capacity determined as in paragraph 1 including deep tank bale capacity only if usable.

4. There may be inserted in Article 24 a figure for insurance valuation for war risk insurance purposes

not in excess of $100.00 per deadweight ton, the deadweight tonnage to be determined as in paragraph 2. If a higher valuation is agreed upon between the parties specific approval for the insertion thereof must be obtained from the Commission.

171 "RESOLVED, THIRD, that in the case of any vessels upon which there are preferred ship mortgages held by the Commission, the approval authorized in RESOLVED SECOND hereof shall not be given unless and until the Director of the Division of Insurance shall advise the Director of Operations & Traffic that the insurance coverage in connection with said charter is satisfactory; provided, however, that war risk insurance shall be considered as satisfactory as to amount if said amount is not less than the mortgage interest of the Commission in said vessel. In the case of vessels of the American President Lines, Ltd., the mortgage interest of the Commission shall be the sum of (a) the release price of said vessel as heretofore agreed upon between said company, the Commission, and the Reconstruction Finance Corporation, in connection with the release of said vessel from the joint mortgage held by the two aforementioned agencies, and (b) the unpaid balance of indebtedness to the Commission represented by the notes secured by the preferred ship mortgage on said vessel;

"RESOLVED, FOURTH, that the Director, Operations & Traffic, be, and he hereby is instructed to report periodically to the Commission each approval given by him or given by the District Manager at New York under his instructions pursuant to the provisions of RESOLVED SECOND hereof;

"RESOLVED, FIFTH, that the approval of the Maritime Commission as required by Sections 9 and 37 of the Shipping Act, 1916, as amended, be and is hereby granted for the charter of privately-owned American flag vessels to the British Ministry of War Transport, on condition that said charter shall be approved as authorized by RESOLVED SECOND hereof, and upon the further condition that said vessels may not be sub-chartered to aliens under this approval;

"RESOLVED, SIXTH, that the Secretary or the Assistant Secretary of the Commission, under the seal of the Commission, be authorized to issue certificates with respect to each of said vessels that the charter thereof has been approved by the Commission pursuant to RESOLVED FIFTH of this resolution."

251817—53——7

The formula referred to in the above-quoted resolution, relating to figure for adjustment of freight, demurrage rates, and lay days to be inserted in paragraphs 2 and 11 of the proposed form of charter, is as follows:

"*Demurrage*

Not exceeding 8,100 DWT	$2,000. per day
8,101 DWT to 9,000 DWT	2,250. per day
9,000 DWT to 10,000 DWT	2,500. per day
10,000 DWT and over DWT	2,750. per day

Time

350,000 to 425,000 bale cubic cargo space	10 days
425,000 to 500,000 bale cubic cargo space	12 days
500,000 to 600,00 bale cubic cargo space	13 days
600,000 and over bale cubic cargo space	14 days

172 The proposed form of charter referred to in the foregoing resolution is in the files of the Secretary.

By the unanimous "yea" vote of the members of the Commission present, the foregoing resolution was adopted, and the proper officers of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect.

173 EXHIBIT 41

May 31, 1941.

Mr. R. A. Nicol,
States Steamship Company,
17 Battery Place,
New York, New York.

DEAR MR. NICOL:

We wish to asknowledge and thank you for making available your steamer VERMONT for service to the Red Sea pursuant to request contained in Mr. Robson's letter to your Company of May 24, 1941.

Under date of May 28 we forwarded to you copies of the form of charter which we desire your Company to execute with the British Ministry of War Transport. In the execution of this charter, please observe the following instructions:

The figure for the adjustment of freight called for by clause 2 of the charter and the demurrage rate called

for by clause 11 of the charter are to be in accordance with the formula annexed hereto.

The lay days which are to be inserted in clause 11 of the charter are also to be determined in accordance with the attached formula and in accordance with the bale cubic capacity of the vessel determined as in clause 1, including deep tank bale capacity only if usable for cargo.

The valuation of the vessel as provided for in clause 24 of the charter for war risk insurance purposes shall not exceed $100 per dead weight ton.

When the charter has been executed, it should be submitted to this Office in triplicate for approval pursuant to clause 28 thereof. There should be submitted with the charter a certificate of a Measurer of the Treasury Department indicating the bale cubic capacity. There should also be submitted a certificate signed by a representative of your Company and approved by the New York District Manager of the Maritime Commission, setting forth the vessel's dead weight. Arrangements for these certificates should be made with Captain Conway.

174 Clause 1 of the form of charter forwarded to you on May 28 refers to Clause 26. This should be corrected to read Clause 25.

The payment of the amounts due under the charter will be made as promptly as possible by the U. S. Maritime Commission from Lease-Lend funds. We are now endeavoring to perfect our procedure under the Lend-Lease Act, so as to insure prompt payment.

We desire this vessel consigned to the American Export Lines, Inc., who will act as agents for the charterer pursuant to clause 8 of the charter.

We will communicate with you shortly relative to the homeward loading in accordance with our program for the movement of strategic and critical materials to United States ports.

Yours very truly,

(Signed) G. H. Helmbold,
Director of Operations and Traffic.

175 EXHIBIT 42

Jun 2 1941.

California Eastern Steamship Lines, Inc.,
Portland,
Oregon.

DEAR SIRS:

The Commission, on May 6, 1941, conditionally waived the operating restrictions attaching to the vessels MAINE and VERMONT during the period of emergency declared to exist by the proclamation of the President dated September 8, 1939, but not beyond June 30, 1942, as follows:

1. During the period of said operating restrictions are waived, the employment of said vessel will be subject to the direction of the Commission.
2. California Eastern Steamship Line, Inc., the purchaser of said vessels, and the Commission will execute the necessary formal agreement amending accordingly the agreement of sale as made by your bid of July 20, 1939, and accepted by the Chairman's letter of July 23, 1937, for the SS MAINE and VERMONT, and the preferred ship mortgages dated August 17, 1937, and September 7, 1937, respectively, given as security for the performance of said agreement of sale.

This letter confirms the informal advice as to the terms and conditions of the foregoing approval given in the telegram to you dated May 10, 1941, signed by Wade H. Skinner, Assistant General Counsel, and consented to by telegram from you dated May 12, 1941.

Very truly yours,

/s/ W. C. PEET, JR.
Secretary

176 EXHIBIT 43

June 2, 1941.

Captain Granville Conway
District Manager,
U. S. Maritime Commission,
New York, N. Y.

DEAR CAPTAIN CONWAY:

We have transmitted direct to the owners of the following vessels assigned to the Red Sea Service, copies of the form

of charter which we wish them to execute with the British Ministry of War Transport:

Isthmian Steamship Company
SS Knoxville City
States Steamship Company
SS Vermont
American Hawaiian Steamship Co.
SS Montanan
SS Alabaman
Lykes Bros. Steamship Co., Inc.
SS Effingham
SS Aquarius
SS Cranford
American President Lines, Ltd.
SS President Buchanan
Calmar Steamship Corporation
SS Kenmar
SS Losmar
Waterman Steamship Corporation
SS Antinous
SS Bienville
SS Pan Kraft
Shepard Steamship Company
SS Wind Rush
American Export Lines, Inc.
SS Extavia
177 *Weyerhaeuser Steamship Co.*
SS Potlatch

We are sending you copies of our letters of transmittal from which you will note the procedure that we desire to have followed. Please note particularly that there should be submitted with the charter a certificate of a Measurer of the Treasury Department, indicating the bale cubic capacity. There should also be submitted a certificate signed by a representative of your company and approved by you, setting forth the vessel's deadweight.

We will write you separately regarding vessels for the Rangoon Service.

Very truly yours,

(Signed) G. H. Helmbold,
Director, Operations and Traffic.

178 EXHIBIT 44

June 3, 1941.

British Ministry of War Transport,
26 Broadway.
New York, N. Y.

DEAR SIRS:

We enclose Charter Party on the Steamer "VERMONT" (in triplicate) covering voyage from New York to the Red Sea.

Please have this Charter signed (in triplicate) and return to us. If you will advise the number of copies required we will see that they are supplied you.

Very truly yours,

CALIFORNIA EASTERN LINE, INC.,
R. A. NICOL,
President.

179 EXHIBIT 45

UNITED STATES MARITIME COMMISSION
WASHINGTON

June 7, 1941

Mr. R. A. Nichol,
States Steamship Company,
17 Battery Place,
New York, New York.

DEAR MR. NICHOL:

Supplementing our letter of May 31, we regret the delay in completing arrangements for the chartering of your vessels and making payment therefor but are now pleased to advise you that practically all the details have been settled and there should be little further delay in the execution of the charter and reimbursement in accordance with the terms of the charter.

In securing reimbursement for the charter hire on these vessels we wish you to observe the following instructions:

1. Freight bill. Upon vessel's sailing prepare a bill for freight earned by the vessel segregated to show the cubic capacity of the vessel under-deck, pursuant to the amount and at the rate shown in the charter and the cubic space occupied by on-deck cargo at the charter rate. This bill should be certified by an authorized representative of the British Ministry of War Transport in New York. In this connection we understand

that forms of certification and a stamp of approval will be available shortly. The freight bill should be supported by the documents called for in paragraphs 2 and 3 hereunder.

2. Charter. In our letter of May 31, we asked you to submit the charter in triplicate. We wish now to amend those instructions to provide for the submission of 5 executed copies to this Office together with such additional number as you and the British Ministry will require. The 5 copies necessary for the Commission and the other interested Departments of the Government will be distributed by us after our approval pursuant to clause 28 of the charter. We will also return to you such additional approved copies as you may transmit and wish returned. We understand that the British Ministry of War Transport in New York have now or will shortly be authorized to execute the document.

180 3. On-Deck Cargo. You should submit a certificate signed by the Master of the vessel and approved by the agent of the charterer showing the number of cubic feet of space occupied by deck cargo. Inasmuch as the on-deck cargo will probably be manifested separately a copy of the manifest certified as above will be satisfactory in lieu of a certificate.

4. Public Voucher. You should prepare a public voucher for reimbursement of the amount shown in your freight bill on Form No. 1034-A, copies of which may be obtained from our District Office. Six yellow copies of the voucher should be prepared. You will certify to the performance of the service as provided for on the face of the voucher, i.e., Certificate No. 1.

All of the documents called for in paragraphs 1 to 4 above should be forwarded to Captain Conway at New York, who will execute Certificate No. 2 of the public voucher and also approve the certificate or manifest covering on-deck cargo. These documents will thereafter be forwarded promptly to this Office so that the account may be placed in line for payment and the approved charter returned to you.

You will be expected to make the payment provided for in clause 27 of the charter direct to the agent, and the Maratime Commission will not be involved in this transaction. Settlement for loading expenses of all cargo and discharging expenses of commercial cargo as well as other charges applicable to such cargo will be made between the agent and the Commission.

It will be appreciated if you will acknowledge promptly the receipt and your understanding of these instructions.

Very truly yours,

G. H. HELMBOLD,
Director, Operations and Traffic.

181 EXHIBIT 46

June 9, 1941.

Mr. G. H. Helmbold,
Director of Operations & Traffic,
U. S. Maritime Commission,
Washington, D. C.

Red Sea Business

DEAR SIR:

This will acknowledge receipt of your letter of June 7th giving us further instructions covering submission of charters on vessels scheduled to load for the Red Sea and for the collection of charter freight.

In Clauses 1 and 3 of these instructions you refer to the "cubic space occupied by on-deck cargo." It is our understanding the charter freight is to be paid at the rates mentioned in the charter per cubic foot of cubic measurement of on-deck cargo carried.

With this change, your instructions are understood and we will endeavor to comply with them.

Your very truly,

R. A. NICOL & CO.,
General Eastern Agents.
President.

182 EXHIBIT 47

June 9, 1941.

Mr. John Gammie, Director
British Ministry of War Transport,
25 Broadway,
New York, N. Y.

DEAR SIR: *S.S. "VERMONT"*

We sent you with our letter of June 3d three copies of charter party of the above steamer for execution.

We are today advised by the U. S. Maritime Commission, in Washington, that we will be required to submit five executed copies for distribution by them after approval, pursuant to Clause 28 of the charter.

We are therefore enclosing you two additional signed copies of this charter and would thank you to execute all

five, returning to us, when we will supply you with as many certified copies as you need.

Yours very truly,

R. A. NICOL & Co., INC.
President.

183 EXHIBIT 48

OFFICE FOR EMERGENCY MANAGEMENT
DIVISION OF DEFENSE AND REPORTS
WASHINGTON, D. C.

June 9, 1941.

British Merchant Shipping Mission,
Willard Hotel,
Washington, D. C.

Attention Mr. R. R. Powell, Secretary
Re: Red Sea Service Requisition No. 1503A:

DEAR MR. POWELL:

The following arrangement with respect to payments required to be made by the British Ministry of War Transport under the form of charter party prepared by the Maritime Commission shall be effected:

a. The United States Maritime Commission will make the following payments required to be made to the owners of chartered owners by the British Ministry of War Transport under the terms of the charter:

1. Freight required to be paid under Clause 1 of the charter.
2. Demurrage, if any, required to be paid under Clause II of the charter.
3. Any increase in charter hire which may become payable under Clause 24 of the charter.
4. Loading and other expenses payable by the charterer under Clauses 4 and 5 of the charter.

b. The United States Maritime Commission shall receive any payments to be made by the owners or chartered owners pursuant to adjustments or reduction of charter hire under the charter which includes:

1. Refunds which may be made under Clause 1 of the charter.
2. Adjustments of freight which may be made under Clause 2 of the charter.
3. Net amounts which may become payable under Clause 25 and reduction in freight resulting from any

reduction in insurance rates under Clause 24 of the charter.

The foregoing arrangements will be effective on vessels covered by requisition No. 1503A and on all future vessels which sail from United States loading ports to the Red Sea until further notice. It is understood, however, that such arrangement will be the subject of further discussion in connection with any changes which may be made in the near future in the charter arrangement.

Sincerely yours,

(Sgd.) J. H. BURNS,
Major General, U. S. Army.

184 EXHIBIT 49

BRITISH MINISTRY OF WAR TRANSPORT

Bowling Green 9-5310

Representative in the U. S. A.

25 Broadway
New York
June 10th, 1941.

Messrs. R. A. Nicol & Co., Inc.,
17 Battery Place,
New York, N. Y.

Attention R. A. Nicol, Esq.

Dear Sirs,

S. S. VERMONT—S. S. TEXAS

We enclose herewith five copies each of the charter of the S. S. VERMONT and S. S. TEXAS, each duly signed.

Will you please furnish us with three copies each, as none have been retained here.

Yours faithfully

JOHN GAMMIE,
Deputy.

185 EXHIBIT 50

June 10th, 1941.

Mr. G. H. Helmbold, Director
Division of Operations & Traffic
United States Maritime Commission
Washington, D. C.

Dear Mr. Helmbold:

In regard to our telephone conversation yesterday concerning vessels to the Red Sea Area, we attach:

1. List of vessels already departed, with sailed and due Suez dates.
2. List of vessels for June sailings, with dates and due Suez dates.
3. List of June Middle East cargo to be shipped for account British Government.

The frequency of departures will result in a considerable number of close arrivals within a comparatively short period of time. Unless excellent conditions prevail to permit prompt berthing and expeditious discharge of each vessel on arrival, serious congestion could develop in the Red Sea Area with resulting indefinite delay to several of these vessels.

The British Ministry of War Transport has written us, suggesting the diversion to Indian ports of three American Export Line vessels intended for the Red Sea Area. This action is apparently necessary to serve the purposes of the Indian authorities and the British Purchasing Commission. We attach a copy of the letter received from the British Ministry of War Transport.

The situation to South Africa, already very tight, due to increases of cargo offerings, and very much aggravated through requisition of steamers and also the loss of the SS Robin Moor, is quite serious. We attach a list of cargo presently offered for South African ports. Many of these items had been booked for sailing, which it was necessary to cancel because the vessels were requisitioned for our own defense needs. The volume of trucks, steel, and some of the other items, we are told, are important to the defense of that area and to the maintenance of industry vital to defense. This situation could be relieved, and you may wish to consider the diversion of some of the ships
186 presently scheduled for the Red Sea. Such a plan could have a double effect: one, ease possible congestion and delay at Suez, and two, afford shipping space for the most important commodities to South Africa.

We would be glad to have your views in this connection.

Yours very truly,

Granville Conway,
District Manager,
North Atlantic District.

187 NORTH ATLANTIC—RED SEA

Vessel	*Departed*	*Due—Suez*
Knoxville City	5-15	7-5
Antinous	5-21	7-11
West Jaffrey	5-25	7-16
West Hardaway	5-26	7-18
West Nohno	5-25	7-14
President Buchanan	5-25	7-11
Montanan	5-28	7-16
Vermont	5-29	7-20
Kenmar	6-1	7-21
Effingham	5-31	7-21
Windrush	5-28	7-20
Bienville	5-31	7-20
Exmoor	6-4	7-24
Losmar	6-3	7-23
Potlatch	6-3	7-23
West Zeda	6-3	7-25
Alabaman	6-8	7-28
Iberville	6-9	7-29
Karmt	6-9	7-29

188 NORTH ATLANTIC—RED SEA

June Scheduled Sailings

Vessels	*To Sail*	*Due—Suez*
Pankraft	6-16	8-11
Texas	6-15	8-10
Columbian	6-12	8-7
Walter A. Luckenbach	6-17	8-12
Marymar	6-16	8-11
Mary Luckenbach	6-20	8-15
W. R. Keever	6-17	8-12
Aquarius	6-21	8-16
West Ira	6-18	8-13
Robert Luckenbach	6-18	8-13
Steel Inventor	6-20	8-15
Edwin Christenson	6-18	8-13
West Durfee	6-16	8-11
Cranford	6-21	8-16
Flomar	6-24	8-19
Nordal	6-25	8-21
Kentuckian	6-27	8-22
President Johnson	6-29	8-24
Wm. L. Thompson	6-29	8-24

Vessels	*To Sail*	*Due—Suez*
Illinois	6-30	8-25
Lewis Luckenbach	7-3	8-30
Excello	7-5	9-2

189 CARGO OFFERINGS—NORTH ATLANTIC—SOUTH AFRICAN PORTS

Trucks, automobiles	75,000 tons
Steel, billets, etc.	100,000 tons
Cyanide	20,000 tons
Motorcycles	1,000 tons
Petroleum products	35,000 tons
Canned goods, milk, etc.	2,500 tons
Flour	1,000 tons
General cargo	50,000 tons
Cereals	3,500 tons

190 BRITISH MINISTRY OF WAR TRANSPORT

Bowling Green 9-5310

Representative in the U.S.A.

25 Broadway, New York
June 10th, 1941.

Captain Granville Conway,
District Manager,
U. S. Maritime Commission,
45 Broadway,
New York, N.Y.

Dear Captain Conway,

We confirm our conversation of yesterday in which you asked us to write you an outline of the position in regard to India.

The Trucks for account of the Indian Government which are scheduled for last half June/early July shipment are Ford and General Motors and amount approximately to 4,000 trucks. These Trucks are knocked down and stow in approximately 60 to 80 cu. ft. per ton, so that the net measurements of the Truck amount to 80 or 90 cu. ft. For your information, these Trucks are shipped to the assembly plants of the Motor Companies mentioned above; hence the close stowage in which they are initially shipped from this side.

In addition, there are about 13,000 tons of Lubricating Oil and Gasoline awaiting shipment from the various American oil companies and for which they are unable to obtain freight space. This shortage was particularly brought

about by the withdrawal of the American ships from the Indian berth and the prior withdrawal of British ships so that the Indian berth is now entirely dependent on charter tonnage.

The situation would be greatly eased if permission is given to the American Export Lines to berth three of their vessels to India and we understand that the EXCELLO, sailing June 20th, the EXCELLENCY, sailing July 5th and the EXILONA, sailing July 10th, are in position. If these vessels could be berthed with the understanding that they would give priority to Indian Government Trucks and Oil and other materials for account of the British Purchasing Commission, the position would be greatly relieved. If the EXCELLO and EXILONA were placed to Bombay and the EXCELLENCY to Calcutta, the end June position would be taken care of.

Yours faithfully,

(Signed) JOHN GAMMIE,
Deputy.

191 JUNE MIDDLE EAST—CARGO

Rock Crushers	395 Tons
Miscellaneous	100 Tons
Assembly Plants	237 Tons
Tractors and Graders	317 Tons
Cranes, Winch	37 Tons
Telephone Wire	1071 Tons
Hospital Supplies	963 Tons
Flour	2500 Tons
Evaporated Milk	1800 Tons
Canned Oleomargerine	500 Tons
Canned Cheese	500 Tons
Special Materials	13500 Tons
Total	21920 Tons

Total Lend Lease Cargo

Priority Cargoes	
Bombs	2662 Tons
Small Arms, Ammunition	418 Tons
Machine Guns	7 Tons
Gasoline in Drums	167 Tons
5000 Trucks	20000 Tons
110 Aeroplane	715 Tons
Total	23969 Tons
Grand Total	45889 Tons

192 EXHIBIT 51

June 11, 1941.

Mr. Granville Conway,
New York District Manager,
U. S. Maritime Commission,
45 Broadway,
New York, N. Y.

DEAR SIR:

SS "VERMONT"

This steamer sailed from New York on May 29 with cargo for the Red Sea under charter to the British Ministry of War Transport under arrangements made with the U. S. Maritime Commission.

In accordance with instructions received from Mr. G. H. Helmbold, Director of Operations and Traffic, we are enclosing you the following documents:

1. Five (5) executed copies of charter party, dated May 29, 1941, together with 2 photostat copies.

2. Seven (7) copies of bill covering the charter freight and freight on on-deck cargo carried—five of which stamped "Approved British Ministry of War Transport."

3. Public voucher on Form 1034a (one original and six yellow copies.)

4. Five (5) copies of list showing total cubic measurement of on-deck cargo carried of 45,659 ft. 2 in.

5. Five (5) copies of certificate certifying the bale cubic capacity of the "VERMONT" to be 412,242 cu. ft.

6. Five (5) copies of certificate setting forth the deadweight of the "VERMONT".

The charter requires the approval of the Maritime Commission. We are informed that the five executed copies are required for distribution at Washington. We have included two photostatic copies and would ask that these be returned to us with order of the Maritime Commission approving this charter.

193 We understand that the original of the Public Voucher requires your certification and we ask that

this be accorded promptly and documents forwarded to Washington to be put in line for payment of the freight.

Yours very truly,

R. A. NICOL & Co., INC.,
General Eastern Agents.
R. A. NICOL,
President.

194 EXHIBIT 52

June 11, 1941.

British Ministry of War Transport,
25 Broadway,
New York, N. Y.

Att. Mr. John Gammie.

SS "VERMONT"

GENTLEMEN:

We are enclosing you one photostatic copy and two certified copies of charter party of this steamer.

Yours very truly,

R. A. NICOL & Co., INC.,
President.

195 EXHIBIT 53

UNITED STATES MARITIME COMMISSION
WASHINGTON

June 14, 1941.

Mr. R. A. Nicol, President,
R. A. Nicol & Co., Inc.,
General Eastern Agents,
Quaker Line,
17 Battery Place,
New York, New York.

DEAR MR. NICOL:

We acknowledge your letter of June 9, 1941 and confirm your understanding that the charter for on-deck cargo is based on the per cubic foot of cubic measurement occupied and at the rate mentioned in the charter.

Very truly yours,

G. H. HELMBOLD,
Director, Operations and Traffic.

196 EXHIBIT 54

UNITED STATES MARITIME COMMISSION
NEW YORK, N. Y.

June 19th, 1941.

Mr. R. A. Nicol, President,
R. A. Nicol & Co., Inc.,
17 Battery Place,
New York, N. Y.

DEAR MR. NICOL:

Subj: S. S. "VERMONT"

Reference is made to your letter of June 11th, 1941, wherein you enclosed documents in connection with the charter of the SS "VERMONT" for service to the Red Sea.

In accordance with your request we are enclosing herewith, two approved photostatic copies of the Charter Party Agreement on this vessel.

Very truly yours,

GRANVILLE CONWAY,
District Manager,
North Atlantic District.

197 EXHIBIT 55

UNITED STATES MARITIME COMMISSION
New York, N. Y.

June 21st, 1941.

Mr. R. A. Nicol, President
States Steamship Company
17 Battery Place
New York City, N. Y.

DEAR MR. NICOL:

re: North Atlantic-Red Sea Area

We have talked with you several times concerning method of presenting documents in support of bills for charter hire for steamers running to the Red Sea. There has been a slight change in respect to some of the requirements and this letter is to set forth the documents and the number of copies of each which will be required.

Therefore, at the time of billing for charter hire, please support the bills in this way:—

1. 5 executed copies of the Charter Party Agreement.
2. 6 copies of the certified freight bill. This bill should show dates vessel commenced loading and sailed.
3. Public voucher, 1 copy form 1034 (white), 6 copies form 1034 A (yellow).
4. 1 copy of the certified list of on-deck cargo and its cubic measurement issued by your loading agent.
5. 6 copies of a certificate showing the bale cubic capacity and the dead-weight tonnage of the vessel. This will be prepared and submitted to you by this office.

We have been receiving from some owners incomplete records including only some of the documents outlined above. Such papers must be held at this office until the supports for each vessel are complete. Please, therefore, hold all papers until the record for each ship is complete and then send them to this office.

We will appreciate your compliance with this request, and meanwhile remain

Yours very truly,

GRANVILLE CONWAY,
District Manager,
North Atlantic District.

198 EXHIBIT 56

UNITED STATES MARITIME COMMISSION

Washington

May 2, 1941.

Mr. R. A. Nicol
States Steamship Company
17 Battery Place
New York, New York

DEAR MR. NICOL:

Please refer to proposed operation of ships in the North Atlantic/Red Sea trade.

It is contemplated at this time that these ships will return with ores from East and South Africa and inasmuch as the traffic is largely handled by regular line steamers of the Seas

Shipping Company, Inc. and the American South African Line, Inc., it is desired that you confer and cooperate with them, particularly with respect to freight which they have been unable to handle.

The Seas Shipping Company, Inc. particularly has been set back in its program due to the fact that we have required some of the ships to handle Turkish chrome ore which moved on a transhipment basis via Lourenco Marques. This ore in effect was handled at the expense of chrome ore and manganese ore originating in East and South Africa.

Before closing any homeward business, however, we would appreciate it if you would confer with us as some space will be required for metallurgical chrome ore from Beira and we are dealing with the Office of Production Management in this regard.

Further in this connection, it is suggested that consideration be given to the question of utilizing the agents of one of the regular operators in the South and East African trade as such agents are, of course, experienced and familiar with the business.

Very truly yours,

G. H. HELMBOLD,
Director, Operations and Traffic.

199 EXHIBIT 57

Jul 12, 1941.

States Steamship Company
Porter Building
Portland, Oregon

GENTLEMEN:

The SS VERMONT, on completion of discharge of cargo at Red Sea ports, has been approved for a voyage with salt from Aden to Calcutta. On completion of discharge at Calcutta, this vessel is to load from Calcutta to United States North Atlantic ports taking the following cargo:

3000 tons manganese ore
1000 tons of mica-shellac
500 tons kyanite
2500 tons burlap

It is requested that the homeward cargo of the vessel be arranged through the American Export Lines, Inc.

Please confirm promptly that satisfactory agreement has been concluded between your good selves and the American Export Lines, Inc., as to agency arrangements, etc., for this homeward voyage and at the same time give us the closest possible estimate of the expected readiness date of the vessel at United States North Atlantic ports for next employment.

Very truly yours,

A. E. KING,
Asst. Director, Emergency Shipping.

200 EXHIBIT 58

GENERAL ACCOUNTING OFFICE

Washington

Accounting and
Bookkeeping Division April 18, 1941.

ACCOUNTS AND PROCEDURES LETTER No. 2475

SUBJECT: Establishment of the appropriation accounts "69-111/30023 Defense Aid, Vessels and Other Watercraft (Allotment to United States Maritime Commission), 1941-1943" and "69-111/30025 Defense Aid, Facilities and Equipment (Allotment to United States Maritime Commission), 1941-1943."

The Defense Aid Supplemental Appropriation Act, 1941, approved March 27, 1941, Public Law 23, appropriated funds to enable the President, through such departments or agencies of the Government as he may designate, to carry out the provisions of An Act to Promote the Defense of the United States, approved March 11, 1941, Public Law 11. In accordance with letter of the President dated April 14, 1941 (Defense Aid Allocation No. 7) to the Secretary of the Treasury, $500,000,000 and $50,000,000 of these funds have been transferred by Defense Aid Transfer Appropriation Warrant No. 11 dated April 14, 1941, from the accounts "111/30023 Defense Aid, Vessels and Other Watercraft, 1941-1943" and "111/30025 Defense Aid, Facilities and Equipment, 1941-1943," respectively, to the United

States Maritime Commission for the purposes indicated below.

In order to account for the funds transferred there are hereby prescribed, pursuant to General Regulations No. 84-Revised and in accordance with an arrangement with the Treasury Department, the following appropriation accounts:

69-1110023 Defense Aid, Vessels and Other Watercraft
3 (Allotment to United States Maritime Commission), 1941-1943 ..... $500,000,000.00
Limitations: No subdivisions.

Purpose: Allotment for vessels, ships, boats, and other watercraft, and equipage, supplies, materials, spare parts, and accessories.

69-1110025 Defense Aid, Facilities and Equipment (Allot-
3 ment to United States Maritime Commission), 1941-1943 ..... 50,000,000.00
Limitations: No subdivisions

201-202 Purpose: Allotment for facilities and equipment, for the manufacture or production of defense articles, by construction or acquisition, including the acquisition of land, and the maintenance and operation of such facilities and equipment.

LINDSAY C. WARREN,
Comptroller General
of the United States.

By: (Signed) J. D. DENIT.
Chief, Accounting and
Bookkeeping Division.

EXHIBIT 59

No. 6850

United States of America

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify That the document hereunto annexed is a true copy from the files of this Department.

In testimony whereof, I, Dean Acheson, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this sixteenth day of November, 1950.

[SEAL]

DEAN ACHESON,
Secretary of State.

By M. P. CHAUVIN,
Authentication Officer, Department of State.

Exhibit 7

ROUTING
(Not to be filled in by requisitioner)
☐ War ☐ Maritime Comm.
☐ Navy ☐ State
☐ WPB ☐ Treasury
☐ Agriculture ☐

FORM 1

REQUISITION FOR DEFENSE ARTICLES
(Under the Act of March 11, 1941)

1503 No.
May 15, 1941 Date
U.K. Requisitioner

British Rate SO/ B.M.S.M.A. No. 67

1. Will orders placed by the United States Government for the material requisitioned herein be covered by direct cash reimbursement to the United States Government? No.

2. Articles (If possible, use continuation sheet(s) for detailed specifications; otherwise attach one complete set of drawings and specifications to each copy of form):
A. Quantity and description (include mark, model, or other identifying designation):

(SFFD)

The cubic capacity of the sixteen U. S. vessels shown on the attached statement.

B. Specifications British (U. S., British, other) C. Use Merchant Shipping (Army, Navy, Air, other)

3. If the articles requisitioned herein are to be installed in or used in the construction of some other article(s), name and identify the basic article(s), indicate number of requisition (Form 1 or 2) or PNB number, or both, covering request for basic article(s), and indicate contract number if contract has been negotiated for basic article(s).
A. Name and identification of basic article(s):

Sixteen U. S. Vessels, as per attached statement.

B. Requisition No. C. PNB. No. D. Contract No.

4. Delivery desired (by check [X] or, if possible, by quantitative breakdown)

1941	2nd Quarter	3rd Quarter	4th Quarter	1942	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
	X							

5. Remarks (Justification of request, urgency, general information, etc.):

Details agreed between British Ministry of War Transport Office, New York, and Representatives of U. S. Maritime Commission.

(Signed) R. M. Powell

(Title) Secretary, British Merchant Shipping Mission

GOVERNMENT OF THE UNITED STATES

[redacted]

1502
No.

REQUISITION FOR DEFENSE ARTICLES

(Under the Act of March 11, 1941)

May 15, 1941
Date

British Rule: SCV | B.M.S.M. No. 67

Section	Additional Information

NORTH ATLANTIC - RED SEA SERVICE

Vessel	Position	
ANTINOUS	New York	May 8
KNOXVILLE CITY	Baltimore	" 9
VERMONT	New York	" 8-10
AQUARIUS	New York	" 10
EFFINGHAM	Baltimore	" 10
WEST HARDAWAY	Philadelphia	" 14
WEST JAFFREY	Philadelphia	" 14
MONTANAN	Boston	" 19
WEST ZEDA	Philadelphia	" 20
PRESIDENT BUCHANAN	New York	" 20
WEST NOHNO	Philadelphia	" 21
WIND RUSH	North Atlantic	" 24
BIENVILLE	North Atlantic	" 24
EXTAVIA	North Atlantic	" 26
CRANFORD	North Atlantic	" 26
PAN KRAFT	North Atlantic	" 26

GOVERNMENT OF THE UNITED STATES

206 EXHIBIT 60

No. 6847

United States of America

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify That the document hereunto annexed is a true copy from the files of this Department.

In testimony whereof, I, Dean Acheson, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this sixteenth day of November, 1950.

[SEAL]

DEAN ACHESON,
Secretary of State.
By M. P. CHAUVIN,
Authentication Officer, Department of State.

My dear Mr. Smith:

Transmitted herewith are the original and one copy of Recommendations on Requisition for Defense Articles Nos. 544, 833, 902, 1064, 1066, 1067, 1069, 1070, 1071, 1072, 1073, 1236, 1285, 1366, 1372, 1373, 1503A, 1524, 1525, 1526, 1529, 1530, 1531, 1532, 1533, 1535, 1536, 1537, 1538, 1540, 1541, 1539, 1542, 1543, 1545, 1546, 1547, 1549, 1550, 1555, 1556, 1558, 1559, 1561, 1565, 1569, 1599, 1600, 1601, 1640, 1704, and 1706, from the United States Maritime Commission. The originals of these recommendations, bearing the signatures of the Chairman and the Director, M. & R. Division, the Director, Division of Purchase and Supply, or the Director, Operations and Traffic, of the United States Maritime Commission, should be attached to the allocation letter and returned to this office for submission to the President. Upon approval by the President, all papers will be returned to your office for distribution with the understanding that the original recommendation will be forwarded to this office for permanent file. The estimated value of the material to be procured on these recommendations is as follows:

(1) From stock on hand procured from appropriations made prior to March 11, 1941 $ —0—
For which reimbursement will be requested in the approximate amount of $ ——

(2) From orders placed under appropriations made prior to March 11, 1941 $ —0—
For which reimbursements will be requested in the approximate amount of $ ——

(3) From new orders to be placed, for which an allocation of Defense Aid funds is hereby requested $7,774,864

207-208 It will be appreciated if you will take the necessary action with respect to the allocation of Defense Aid funds herein requested.

The allocation letter should also contain an authorization to the Maritime Commission to turn over the defense articles procured from the funds allocated under Requisitions No. 902, 1236, and 1366 to the appropriate officer or representative of His Majesty's Government in the United Kingdom when they are ready for delivery. For your convenience we have prepared and enclose copies of a table which can accompany the allocation letter to show in detail the items authorized for transfer.

Sincerely yours,

(Signed) J. H. BURNS,
Executive Officer,
Division of Defense Aid Reports.

Honorable HAROLD D. SMITH,
Director, Bureau of the Budget,
State Department Building,
Washington, D. C.

EXHIBIT 61

No. 6851

United States of America

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify That the document hereunto annexed is a true copy from the files of this Department.

In testimony whereof, I, Dean Acheson, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this sixteenth day of November, 1950.

[SEAL]

DEAN ACHESON,
Secretary of State.
By M. P. CHAUVIN,
Authentication Officer, Department of State.

ROUTING
(Not to be filled in by requisitioner)

☐ War ☒ Maritime Comm.
☒ Navy ☐ State
☒ OPM ☐ Treasury
☐ Agriculture ☐

JUN 10

FORM 1b - AMENDMENT

REQUISITION FOR DEFENSE ARTICLES
(Under the Act of March 11, 1941)

1503A
No.
June 9, 1941
Date
U. K.
Requisitioner

British Ref: SO/

D.M.S.M. No. 67

Section	Describe fully nature of amendment desired; state whether substitution, addition, cancellation, etc.
2 A	ADDITION Amended to read: "For the cubic capacity of the 16 (sixteen) U. S. vessels shown on the attached statement and all necessary cargo loading expenses on the outward voyage in connection with the operation of the vessels."

(Signed) R. K. Jowell

(Title) Secretary
British Merchant Shipping Mission
GOVERNMENT OF THE UNITED STATES

ncies Consulted

- ☐ War
- ☐ Navy
- ☐ OPM
- ☐ Agriculture
- ☐ Maritime Comm.
- ☐ State
- ☐ Treasury
- ☐ _____

FORM LLA 3

Recommendation on Requisition for
Defense Articles
(Under the Act of March 11, 1941)

No. of Detail Sheets Attached: 1

_____ A
Req. No.

_____
Requisitioner

_____
Agency Reporting

1. It is recommended that the following goods and/or services listed on the requisition be supplied in the quantity indicated below from the sources shown on the detail sheets attached:

Quantity	Description	Estimated Value	Detail Sheet No.
10 vessels	transportation cost (based on		
	cubic capacity of vessels) and		
	cargo loading expense for 10		
	U.S. flag vessels scheduled to		
	load at New York and/or Philadelphia		
	to the Red Sea area during the		
	month of May, 1941	$6,266,000.00	1
	Note: (A)		
	See list of vessels on reverse		
	side of this sheet.		

ORIGINAL FILE COPY

2.a. It is recommended that the following items on the requisition not be supplied:

Quantity	Description		
(A)			
X	Vessel		
	ANTINOUS	New York	5/6/41
	KNOXVILLE CITY	Balto.	5/9/41
	VERMONT	New York	5/10/41
	AQUARIUS	New York	5/10/41
	EPPINGHAM	Balto.	5/10/41
	WEST HARDAWAY	Phila.	5/11/41
	WEST JAFFREY	Phila.	5/12/41
	MUSTANG	Boston	6/19/41
	WEST LINDA	Phila.	5/20/41
	PERS. MURCHISON	New York	5/20/41
	WEST WALFORD	Phila.	5/21/41
	WIND RUSH	North Atlantic	5/24/41
	MINNEVILLE	North Atlantic	5/25/41
	ESTATIA	North Atlantic	5/26/41
	STAFFORD	North Atlantic	5/28/41
	SAN ERAFI	North Atlantic	5/29/41

2.b. Reason for non-supply of requisitioned items:

X Estimates of classification of cargo commodities indicate requirement of funds from the following sections of the Defense Aid Supplemental Appropriation Act 1941

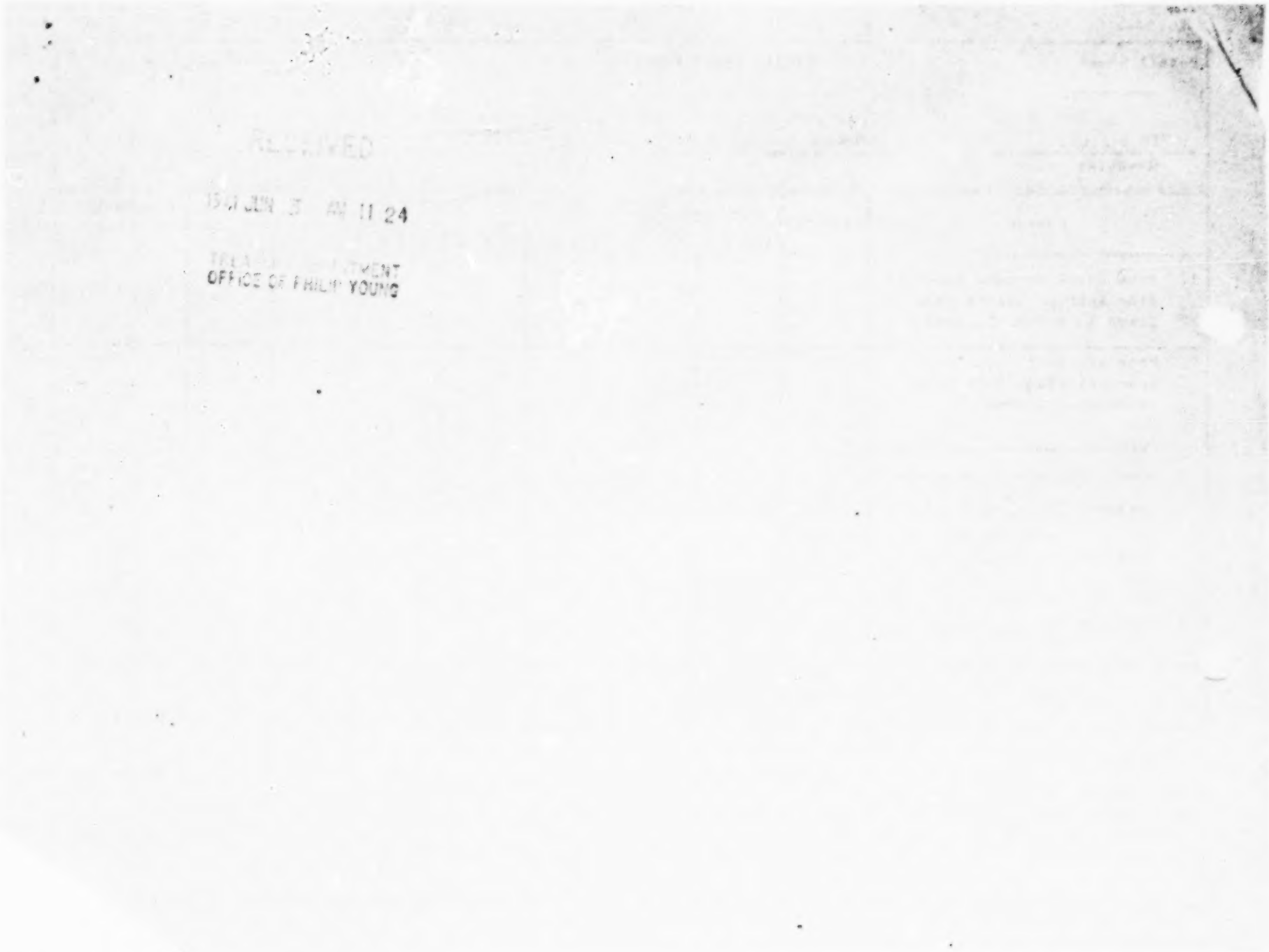
Section 1.(a)(1)	Ordnance	11,000.00
" 1.(a)(2)	Air Craft	102,000.00
1.(a)(4)	Tanks	4,750,000.00
" 1.(a)(7)	Agricultural & Industrial	1,400,000.00
		6,266,000.00

3. Allocation of funds is requested in the amount of $ 6,266,000.00 to cover new order(s) to be placed under this requisition for which funds have not yet been allocated by the President. It is suggested that this allocation be made from funds appropriated under Section _____, entitled (X) see above of the Defense Aid Supplemental Appropriation Act, 1941.

4. Authorization (is)(~~is not~~) requested to transfer material and/or services procured to fill this requisition to the Government of Great Britain

(Approved)	(Signed) G. H. Helmbold
(Title) Commissioner	(Title) G. H. Helmbold Director
(Dept.) War Maritime Comm.	(Dept.) Operations and Traffic
(Date) 5/31/41	(Date) 5/29/41

Government of the United States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OFFICE OF PHILIP YOUNG

215–217 EXHIBIT 63

No. 6845

United States of America

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify That thee document hereunto annexed is a true copy from the files of this Department.

In testimony whereof, I, Dean Acheson, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this sixteenth day of November, 1950.

[SEAL]

DEAN ACHESON,
Secretary of State.
By M. P. CHAUVIN,
Authentication Officer, Department of State.

Reg. 1503A
Defense Aid Allocation
No. 72
June 9, 1941

My dear Mr. Secretary:

Under the provisions of the Act entitled "An Act to Promote the Defense of the United States", approved March 11, 1941, I hereby make the following allotments of funds to the Maritime Commission from the appropriations provided by the "Defense Aid Supplemental Appropriation Act, 1941", approved March 27, 1941:

MARITIME COMMISSION

Ordnance and ordnance stores, supplies, spare parts, and materials, including armor and ammunition and components thereof	$ 14,000
Aircraft and aeronautical material, including engines, spare parts, and accessories	102,000
Tanks, armored cars, automobiles, trucks, and other automotive vehicles, spare parts, and accessories	4,750,000

Vessels, ships, boats, and other water craft, and equipage, supplies, materials, spare parts, and accessories	$400,000
Agricultural, industrial, and other commodities and articles	1,400,000
For testing, inspecting, proving, repairing, outfitting, reconditioning, or otherwise placing in good working order any defense articles for the Government of any country whose defense the President deems vital to the defense of the United States, including services and expenses in conection therewith	1,108,864
Total	$7,774,864

Please arrange for the necessary transfers of funds and advise the Maritime Commission when this has been done.

Sincerely yours,

(Signed) FRANKLIN D. ROOSEVELT.

The Honorable,
The Secretary of the Treasury.

218 EXHIBIT 64

No. 6846

United States of America

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify That the document hereunto annexed is a true copy from the files of this Department.

In testimony whereof, I, Dean Acheson, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this sixteenth day of November, 1950.

[SEAL]

DEAN ACHESON,
Secretary of State.
By M. P. CHAUVIN,
Authentication Officer, Department of State.

June 9, 1941

My dear Mr. Chairman:

I have made the following allocations from the appropriations provided by the "Defense Aid Supplemental Appropriation Act, 1941":

Item 1—Ordnance and ordnance stores, supplies, spare parts, and materials, including armor and ammunition and components thereof	$ 14,000
Item 2—Aircraft and aeronautical material, including engines, spare parts, and accessories	102,000
Item 3—Tanks, armored cars, automobiles, trucks, and other automotive vehicles, spare parts, and accessories	4,750,000
Item 4—Vessels, ships, boats, and other water craft, and equipage, supplies, materials, spare parts, and accessories	400,000
Item 5—Agricultural, industrial, and other commodities and articles	1,400,000
Item 6—For testing, inspecting, proving, repairing, outfitting, reconditioning, or otherwise placing in good working order any defense articles for the Government of any country whose defense the President deems vital to the defense of the United States, including services and expenses in connection therewith	1,108,864
Total	$7,774,864

You are authorized to enter into commitments at this time as follows:

	Under Item 1	
Req. 1503A	Transportation of materials from New York and/or Philadelphia to the Red Sea area	$ 14,000
	Under Item 2	
Req. 1503A	Transportation of materials from New York and/or Philadelphia to the Red Sea area	102,000
219	Under Item 3	
Req. 1503A	Transportation of materials from New York and/or Philadelphia to the Red Sea area	4,750,000
	Under Item 4	
Req. 902	150,000 feet mining cable	75,000
Req. 1236	2400 compass corrector coils and 600 compass coil resistance boxes	150,000
Req. 1366	2,400,000 feet Degaussing cable	175,000
	Total	400,000
	Under Item 5	
Req. 1503A	Transportation of materials from New York and/or Philadelphia to the Red Sea area	1,400,000

Under Item 6

Req, 544, 833, 1064, 1066, 1067, 1069, 1070, 1071, 1072, 1073, 1285, 1372, 1373, 1524, 1525, 1526, 1529, 1530, 1531, 1532, 1533, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1545, 1546, 1547, 1549, 1550, 1555, 1556, 1558, 1559, 1561, 1565, 1569, 1599, 1600, 1601, 1640, 1704, 1706.	Repairs or Degaussing of merchant vessels	1,108,864

Within the total amount of commitments above authorized under each item necessary adjustments may be made between the amounts specified for the various articles to meet requirements for the procurement of the number of articles enumerated.

None of the funds herein allocated may be used to reimburse appropriations of the Maritime Commission for the value of materials on hand and used for the work herein authorized, except as may hereafter be specifically authorized by me.

220–221

You are also authorized to transfer to the appropriate officer or representative of His Majesty's Government in the United Kingdom the defense articles procured from the funds allocated under Requisitions No. 902, 1236, and 1366 when they are ready for delivery.

I should appreciate it if you will arrange with the Chairman of the British Supply Council in North America for the time, method, and other details of the disposition.

Sincerely yours,

(Signed) Franklin D. Roosevelt

The Honorable,
The Chairman,
The United States Maritime Commission.

221–222

Exhibit 65

No. 6843

United States of America

Department of State

To all to whom these presents shall come, Greeting:

I Certify That the document hereunto annexed is a true copy from the files of this Department.

In testimony whereof, I, Dean Acheson, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Offi-

Exhibit 69

Standard Form No. 1034—Rev. Form approved by Comptroller General, U. S. May 28, 1937 (Amended August 18, 1941)

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

WAR SHIPPING ADMINISTRATION

D. O. Vou. No. 225126

Bu. Vou. No.

GENERAL ACCOUNTING OFFICE PREAUDIT
Certified for payment in the sum of $.....
Comptroller General of the United States
By .....

U. S. Maritime Commission
(Department, bureau, or establishment)

Voucher prepared at New York, July 13, 1942
(Give place and date)

THE UNITED STATES Dr. 561 JUL 28 1942

To California Eastern Line, Inc.
R. A. Nicol & Co., Inc., Agents.
(Payee)

Address 17 Battery Place, New York, N.Y.

Payee's Account No. WSA-DA 43 -

PAID BY
G. F. ALLEN
CHIEF DISBURSING OFFICER
TREASURY DEPARTMENT
SYMBOL 223-100
(For use of Paying Office)

No. and Date of Order	Date of Delivery or Service	Articles or Services (Enter description, item number of contract or general supply schedule, and other information deemed necessary) Terms ..... % Discount Cash ..... days	Quantity	UNIT PRICE Cost	UNIT PRICE Per	AMOUNT Dollars	AMOUNT Cts.
		Brought forward from continuation sheet(s)					
		S.S. "VERMONT" Voy. #1 New York - Port Sudan					
Charter Party May 29, 1941	1503	DEMURRAGE: Time used loading & discharging 16 days 12 hrs 48 min. Less allowable lay days 10 " Time for Charterer's account 6 days 12 hrs 48 min @ $2250.00 per day				$14,700.00	
					Total	$14,700.00	

Shipped from ..... to ..... Weight ..... Government B L No .....

(Payee must NOT use this space)

Differences .....

I certify that the above bill is correct and just, that payment therefor has not been received, that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with, and that State or local sales taxes are not included in the amounts billed.

*Payee CALIFORNIA EASTERN LINE, Inc.
By R. A. Nicol & Co., Inc., Agents
(Sign original only)

Per Thomas A. Lewis, Jr. Treasurer

Account verified, correct for 14700.00

(Signature or initials)

Contract No. ..... Date ..... Req. No. ..... Date ..... Invoice Rec'd .....

Pursuant to authority vested in me, I certify that the above articles were received in good condition, after due inspection, acceptance, and delivery prior to payment as required by law, or the services were performed as stated; that they were procured under the contract numbered above or the unnumbered contract attached hereto, or that they were procured without written contract, in open market, and with or without advertising, under the circumstances stated in No. ..... of "Method of or Absence of Advertising" shown on reverse hereof, and were necessary for the public service, and that the prices charged are just and reasonable and in accordance with the agreement.

†Approved for $14700.00

(Sign original only)

J. S. Keating
DISTRICT AUDITOR

Stephen H. Elliot
STEPHEN H. ELLIOT
Title PORT CAPTAIN
NORTH ATLANTIC DISTRICT

ACCOUNTING CLASSIFICATION (for completion by Administrative Office)

Appropriation, limitation, or project symbol	Appropriation title	Limit'n or Proj't Amount	Appropriation Amount
	111/3002 (05) Defense Aid, Vessels and Other Watercraft (Allocations to War Shipping Administration), 1942	✓	

Allotment symbol	Amount	Obligations liquidated	COST ACCOUNT Symbol	COST ACCOUNT Amount	OBJECTIVE CLASSIFICATION Symbol	OBJECTIVE CLASSIFICATION Amount
		JUL 30 1942				

Paid by { Check No. 3379 dated ..... 19.... for $..... } on Treasurer of the United States in favor of payee named above.
{ Cash $..... on ..... 19..... Payee ..... }

Per .....

Title .....

a-1(b)

233

cer of the said Department, at the city of Washington, in the District of Columbia, this sixteenth day of November, 1950.

[SEAL] DEAN ACHESON,
Secretary of State.
By M. P. CHAUVIN,
Authentication Officer, Department of State.

June 30, 1941

My dear Mr. Blandford:

Under the provisions of the act entitled "An Act to Promote the Defense of the United States," approved March 11, 1941, the President allocated to the Maritime Commission in Letter No. 72, of June 9, 1942, among other items, the following:

Item 1—Ordnance and ordnance stores, supplies, spare parts, and materials, including armor and ammunition and components thereof	$ 14,000
Item 2—Aircraft and aeronautical material, including engines, spare parts, and accessories	102,000
Item 3—Tanks, armored cars, automobiles, trucks, and other automotive vehicles, spare parts, and accessories	4,750,000
Item 5—Agricultural, industrial, and other commodities and articles	1,400,000
	$6,266,000

Under recent arrangements, of which your Bureau has been advised, procedure has been developed whereby the transportation of materials, covered by Requisition No. 1503A, from the United States to the Red Sea area will be charged to Appropriation Symbol 111/30023, Defense Aid, Vessels and Other Watercraft.

The Maritime Commission has requested that steps be taken to effect a revocation of the foregoing allocations in the amount of $6,266,000 under the several categories, and have the entire amount of $6,266,000 allocated under "Vessels and Other Watercraft."

223-224 It will be appreciated if you will arrange to have the President issue the necessary letter of revoca-

tion under the several headings, and make an equivalent allocation under "Vessels and Other Watercraft."

Sincerely yours,

(Signed) J. H. BURNS,
Executive Officer,
Division of Defense Aid Reports.

Hon. JOHN B. BLANDFORD, JR.,
Acting Director
Bureau of the Budget
State Department Building
Washington, D. C.

EXHIBIT 66

United States of America

GENERAL ACCOUNTING OFFICE

Pursuant to the provisions of sections 306 and 311 (e) of the Budget and Accounting Act, 1921, 42 Stat. 24, 25; 31 U. S. C. 46, 52 (e), and to 4 CFR 12.2 (a), I hereby certify that the annexed documents, numbered 1–1 to 1–4, inc., are true copies of the official documents now on file in the General Accounting Office in the following case: California Eastern Line, Inc.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 18th day of April in the year 1950 at Washington.

By direction of the Comptroller General of the United States,

[SEAL]

R. F. MARTIN,
Chief Clerk,
General Accounting Office.

Exhibit 66

Standard Form No. 1034—Rev. Form approved by Comptroller General, U. S. May 25, 1936 (Cir. Reg. No. 61, Supp. No. 7)

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

6/19

D. O. Voucher No. 2298138 V/V

Sch. Vou. No. .....

GENERAL ACCOUNTING OFFICE PREAUDIT
Certified for payment in the sum of $.....
Comptroller General of the United States
By .....

U. S. Maritime Commission
(Department, bureau, or establishment)

Voucher prepared at New York June 10, 1941
(Give place and date)

THE UNITED STATES, Dr.

To CALIFORNIA EASTERN LINE, Inc.
(Payee)

Address 17 Battery Place, New York, N.Y.

Payee's Account No. .....

PAID BY
G. F. ALLEN
CHIEF DISBURSING OFFICER
TREASURY DEPARTMENT
SYMBOL 223-890
(For use of Paying Office)

No. and Date of Order	Date of Delivery or Service	Articles or Services (Enter description, item number of contract or general supply schedule, and other information deemed necessary) Terms .....% Discount Cash ..... days	Quantity	UNIT PRICE Cost	UNIT PRICE Per	AMOUNT Dollars	AMOUNT Cts.
		Brought forward from continuation sheet(s)					
British Req. 1503A		Charter freight, as per freight bill attached, in accordance with Charter Party on SS VERMONT, dated May 29, 1941:	96422				
APPROVED:		413,943 cu.ft. bale space @ 75¢ per cu.ft.				$309,181	50
T. M. Lyle Cuthbert		45,659 cu.ft. 2 inches On-deck cargo @ 60¢ per cu.ft.				27,395	50
Shipped from New York to Suez		Weight	Government B/L No.		Total	$336,577	00

I certify that the above bill is correct and just, that payment therefor has not been received; and that except as otherwise noted all of the articles, materials, and supplies furnished under purchase order No. ..... if unmanufactured articles, materials, and supplies, have been mined or produced in the United States, and if manufactured articles, materials, and supplies, they have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

*Payee CALIFORNIA EASTERN LINE, Inc. (Sign original only)
(This certificate not required when public exigencies do not permit, and explanation is made on attached bill or bills)

Per R. A. Hibbert Title President

(Payee must NOT use this space)
Differences .....
Account verified; correct for 336,577.00
(Signature or initials)

Contract No. ..... Date ..... Req. No. ..... Date ..... Invoice Rec'd .....

Pursuant to authority vested in me, I certify that the above articles were received in good condition, after due inspection, acceptance, and delivery prior to payment as required by law, or the services were performed as stated; that they were procured under the contract numbered above or the unnumbered contract attached hereto, or that they were procured without written contract, in open market, and with or without advertising, under the circumstances stated in No. ..... of "Method of or Absence of Advertising" shown on reverse hereof, and were necessary for the public service; and that the prices charged are just and reasonable and in accordance with the agreement.

†Approved for $ 336,577.00 (Sign original only)

T. M. Lyle Cuthbert

Title .....

ACCOUNTING CLASSIFICATION (for completion by Administrative Office)

Appropriation, limitation, or project symbol	Appropriation title	Limit'n or Proj't Amount	Appropriation Amount

Allotment symbol	Amount	Encumbrance liquidated	COST ACCOUNT Symbol	COST ACCOUNT Amount	OBJECT OF EXPENDITURE Symbol	OBJECT OF EXPENDITURE Amount

Paid by { Check No. ..... dated ..... 19.... for $..... } on Treasurer of the United States in favor of payee named above.
Cash $..... on ..... 19.... *Payee .....
(Sign original only)

* Where payment is effected or evidenced by the issue of a warrant or requisition, the name of the payee appearing in such warrant or requisition must be shown in full. If the claim is allowed in part, the amount allowed must be stated. Where the payment differs in any respect from the amount claimed, the difference must be explained. Where the payment differs from the amount claimed because of a credit, the nature of the credit must be shown below "Approved for $.....", and must be explained.

† Where payment is effected by check, the amount approved must be shown in words and figures.

S. S. VERMONT 10—1938

Per .....
(Sign original only)
Title .....

225

METHOD OF OR ABSENCE OF ADVERTISING

(Sec. 3709 of the Revised Statutes)

1. After advertising in newspapers.

2. (a) After advertising by circular letters sent to ..... dealers.

   (b) And by notices posted in public places.

   (If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate on the face of the voucher must be "2(a)(b)" or "2(a)", depending on whether or not notices were posted.)

3. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.

4. Without advertising in accordance with .....

5. Without advertising, it being impracticable to secure competition because of .....

.....

.....

.....

.....

(Here state in detail the nature of the exigency or circumstances under which the securing of competition was impracticable under 3 and 4)

NOTE.—The above form "Method of or Absence of Advertising" is to be used when purchases are made or services secured under proper authority without written agreement in any form. In case of a written agreement (formal contract, proposal, and acceptance, or less formal agreement) Standard Form No. 1036—Revised should be used for abstracting the method of or absence of advertising and award of contract. (See General Regulations No. 51, Supplement No. 6, General Accounting Office, Aug. 20, 1930.) 10–1781

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TELEPHONE WHITEHALL 4-7880

New York, June 10, 1941 19

Messrs. British Ministry of War Transport

QUAKER LINE
CALIFORNIA-EASTERN LINE
R. A. NICOL & CO., Inc., Agents
17 BATTERY PLACE

Agents for Steamship VERMONT Freight, etc. from New York

as per Bill of Lading No. - Discharging at Suez

To Charter freight, as per Charter Party dated May 29, 1941:				
412,242 cu.ft.bale space @ 75¢ per cu.ft.	$309,181	50		
45,659 cu.ft. 2 inches On-deck cargo @ 60¢ per cu.ft.	27,395	50		
			$336,577	00

We hereby certify that the supplies and/or services set forth above have been satisfactorily delivered and/or rendered to the vessel above named presently under requisition/charter to His Britannic Majesty's Government. This is not a certificate of value.

John Bassiti
Deputy

~~Charges must be paid and Original Bill of Lading surrendered before delivery can be made~~

Received Payment,

R. A. NICOL & CO., INC., AGENTS

Per .....

1-2

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228 QUAKER LINE

CALIFORNIA-EASTERN LINE

(States Steamship Company)

Fast Intercoastal Freight Services

R. A. Nicol & Co., Inc.

General Eastern Agents

17 Battery Place Telephone WHitehall 4-7580

New York, N. Y.

June 3, 1941

This is to certify that the Steamer "VERMONT", of 3524 tons net register, has a deadweight capacity of 8527 tons on a summer draft of 24′ 1¼″.

CALIFORNIA EASTERN LINE, INC.,
R. A. NICOL,
President.

Approved:
GRANVILLE CONWAY,
New York District Manager,
U. S. Maritime Commission.

229 UNITED STATES MARITIME COMMISSION

New York, N. Y.

June 6th, 1941.

This is to certify that the S. S. "VERMONT" has a bale cubic capacity of 412,242 cubic feet and it will be in order for you to tender this figure in accordance with paragraphs Nos. 14 and 15 of charter agreement for this vessel.

GRANVILLE CONWAY,
District Manager,
North Atlantic District.

230-232 EXHIBIT 67

GENERAL ACCOUNTING OFFICE

Washington

Accounting and Bookkeeping Division

March 9, 1942

ACCOUNTS AND PROCEDURES LETTER NO. 4245

Subject: Establishment of transfer appropriation accounts for the War Shipping Administration, Office for Emergency Management, Executive Office of the President.

Pursuant to Title I of the First War Powers Act, 1941, approved December 18, 1941, 55 Stat. 838, and Executive Order of the President, numbered 9054, dated February 7, 1942, and letter of the Director of the Bureau of the Budget to the Secretary of the Treasury, dated March 3, 1942, approved by the President March 4, 1942, and by Transfer Journal No. 13, dated March 6, 1942, funds heretofore allotted and transferred to the United States Maritime Commission from the appropriation accounts "111/30023 Defense Aid, Vessels and Other Watercraft, 1941-1943," "111/30026 Defense Aid, Agricultural, Industrial, and Other Commodities, 1941-1943" and "111/30027 Defense Aid, Testing, Reconditioning, etc., of Defense Articles, 1941-1943" have been transferred to the War Shipping Administration from the appropriation accounts "69-111/30023 Defense Aid, Vessels and Other Watercraft (Allotment to United States Maritime Commission), 1941-1943," "69-111/30026 Defense Aid, Agricultural, Industrial, and Other Commodities (Allotment to United States Maritime Commission), 1941-1943" and "69-111/30027 Defense Aid, Testing, Reconditioning, etc., of Defense Articles (Allotment to United States Maritime Commission), 1941-1943," respectively, in the amounts and for the purposes indicated below.

In order to account for the funds transferred to the War Shipping Administration, there are hereby prescribed pursuant to General Regulations No. 84—Revised and in accordance with an arrangement with the Treasury Department, the following transfer appropriation accounts:

1110023(05) 3 Defense Aid, Vessels and Other Watercraft (Allotment to War Shipping Administration), 1941-1943 $175,000,000.00
Limitations: No subdivisions

Purpose: For vessels, ships, boats, and other watercraft, including the hire or other temporary use thereof, and equipage, supplies, materials, spare parts, and accessories.

231-232

1110026(05) 3 Defense Aid, Agricultural, Industrial, and Other Commodities (Allotment to War Shipping Administration), 1941-1943 $60,000,000.00
Limitations: No subdivisions

Purpose: For agricultural, industrial, and other commodities and articles.

1110027(05) 3 Defense Aid, Testing, Reconditioning, etc., of Defense Articles (Allotment to War Shipping Administration), 1941-1943 $90,000,000.00
Limitations: No subdivisions

Purpose: For testing, inspecting, proving, repairing, outfitting, reconditioning, or otherwise placing in good working order any defense articles for the government of any country whose defense the President deems vital to the defense of the United States, including services and expenses in connection therewith.

LINDSAY C. WARREN,
Comptroller General of the United States,
By: (Signed) J. D. DENIT,
Chief, Accounting and Bookkeeping Division.

251817—53——9

EXHIBIT 68

United States of America

GENERAL ACCOUNTING OFFICE

Pursuant to the provisions of sections 306 and 311 (e) of the Budget and Accounting Act, 1921, 42 Stat. 24, 25; 31 U. S. C. 46, 52 (e), and to 4 CFR 12.2 (a), I hereby certify that the annexed documents, numbered 2–1 to 2–12, inc., are true copies of the official documents now on file in the General Accounting Office in the following case: California Eastern Line, Inc., R. A. Nicol & Co., Inc., Agents.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 18th day of April in the year 1950 at Washington.

By direction of the Comptroller General of the United States.

[SEAL]

R. F. MARTIN,
Chief Clerk,
General Accounting Office.

1-F

METHOD OF OR ABSENCE OF ADVERTISING

(Sec. 3709 of the Revised Statutes)

1. After advertising in newspapers.

2. (a) After advertising by circular letters sent to ..... dealers.

   (b) And by notices posted in public places.

   (If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate on the face of the voucher must be "2(a)(b)" or "2(a)", depending on whether or not notices were posted.)

3. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.

4. Without advertising in accordance with .....

5. Without advertising, it being impracticable to secure competition because of .....

.....

.....

.....

.....

(Here state in detail the nature of the exigency or circumstances under which the securing of competition was impracticable under 3 and 4)

NOTE.—The above form "Method of or Absence of Advertising" is to be used when purchases are made or services secured under proper authority without written agreement in any form. In case of a written agreement (formal contract, proposal, and acceptance, or less formal agreement) Standard Form No. 1036—Revised should be used for abstracting the method of or absence of advertising and award of contract. (See General Regulations No. 51, Supplement No. 6, General Accounting Office, Aug. 20, 1930.)

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BMWT-2A MO-1920

BRITISH MINISTRY OF WAR TRANSPORT

REPRESENTATIVE IN THE U.S.A.
NEW YORK, N.Y.

In Your Reply
Kindly Quote

July 15th, 1942

To: U. S. War Shipping Administration
Washington, D. C.

We hereby acknowledge receipt of the services and supplies afforded to the vessel "VERMONT" at the port of New York - Port Sudan between the dates _____ & _____, procured pursuant to the provisions of Public Law 11, 77th Congress, approved March 11, 1941, in full satisfaction of _____ [illegible] due to above vessel for above voyage, "VERMONT" being covered by requisition No. 1503 (Form 1), filed pursuant to said act.

This receipt is not a representation or an appraisal of the value of the services and supplies so received.

HIS MAJESTY'S GOVERNMENT IN THE
UNITED KINGDOM

W. H. Ford

By _____
For and on Behalf of Ministry
of War Transport

BMWT 3806

2-2

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STATEMENT

NEW YORK, July 13, 1942

British Ministry of War Transport
25 Broadway
New York, N.Y.

IN ACCOUNT WITH
CALIFORNIA EASTERN LINE, Inc.
R. A. NICOL & CO., INC., Agents
17 BATTERY PLACE

REQ. NO.		
1503	U.S.S. "VERMONT" Voy. #1 New York - Port Sudan	
	Demurrage, as per Clause 11 of Charter Party dated May 29, 1941:	
	Total time used loading and discharging 16 days 12 hrs 48 min.	
	Less allowable lay days 10 "	
	Demurrage time for charterer's account 6 days 12 hrs 48 min.	
	6 days 12 hrs 48 min @ $2350.00 per day	$14,700.00

This invoice has been audited and is approved for the amount of $14700.00

P. F. McGregor
Auditor, U. S. M. C.

2-3

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237-239 BRITISH MINISTRY OF WAR TRANSPORT
Representative in the U. S. A.
25 Broadway, New York

July 14th, 1942

Mr. J. F. Keating
District Auditor
U. S. War Shipping Administration
39 Broadway
New York, N. Y.

Demurrage

"VERMONT"—Red Sea Charter

Dear Mr. Keating:

We duly received your letter of the 10th instant, enclosing revised calculations in regard to this vessel's demurrage claim and showing the amount due to owners as $14,700. We are pleased to enclose amended bill of the California Eastern Line for this latter figure as well as their public voucher in similar amount.

The various supporting documents are also attached, which, we believe, will enable you to clear this claim for payment.

Yours faithfully,

WHJ:T:GM
enc.

Director.

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QUAKER LINE

CALIFORNIA-EASTERN LINE

(States Steamship Company)

Fast Intercoastal Freight Services

R. A. Nicol & Co., Inc.

General Eastern Agents

17 Battery Place Telephone WHitehall 4-7580

New York, N. Y.

July 13, 1942

British Ministry of War Transport
25 Broadway
New York, N. Y.

Att. Mr. W. E. Turner

Gentlemen: S. S. "VERMONT"

This will acknowledge receipt of your letter of July 11 with enclosures and we note the discrepancies between the bill as originally rendered and your audit of the time used and demurrage due.

We have amended our claim in accordance with your statement and now enclose—

11 copies of our invoice in amount of $14,700.00
(8 copies for the Maritime Commission
3 copies for your file)
7 copies of Public Voucher (1 white and 6 yellow)
for the Maritime Commission

We are also enclosing 8 copies of additional lay time statements loading and discharging which please turn over to the Maritime Commission when submitting your letter of certification and other documents in support of our claim. Copies of these lay time statements were sent you on February 19 for your own file.

Yours very truly,

R. A. NICOL & CO., Inc.,
R. A. Nicol,
President.

RAN:EB.
Enc.

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QUAKER LINE

CALIFORNIA-EASTERN LINE

(States Steamship Company)

Fast Intercoastal Freight Services

R. A. Nicol & Co., Inc.

General Eastern Agents

17 Battery Place Telephone WHitehall 4-7580

New York, N. Y.

May 23, 1941

Export Steamship Corp.
25 Broadway
New York, N. Y.

Gentlemen:

This will serve as notice that the SS "VERMONT", under my command, is in all respects ready to load subject to Charter Party now being worked out with the U. S. Maritime Commission.

The "VERMONT" will be shifted to berth as ordered by you to commence loading tomorrow morning when lay days under the Charter will commence to count. There will be available for cargo 412,242 cu. ft. bale space, the deep tank being used for fuel.

Yours very truly,

J. GIBET,
Master, SS "VERMONT"

242-246 STATES STEAMSHIP COMPANY

Porter Building

Portland, Oregon, U. S. A.

Cable Address "Statesline" all codes

July 28, 1941

S.S. Vermont, Voy. No. 13, at Port Sudan.

Gellatly Hankey & Comp.
Agents Export Steamship Corp.
Port Sudan.

Gentlemen,

This will serve as notice that the S. S. VERMONT under my command, on arrival at this Port is in all respects ready to discharge cargo.

Lay Days to commence from this date July 28 1941 at 12:00 Noon.

J. GIBET,
Master.

For Gellatly Hankey & Co (Sudan) Ltd.
H. SAINCOT.

EXHIBIT 69

United States of America

GENERAL ACCOUNTING OFFICE

Pursuant to the provisions of sections 306 and 311 (e) of the Budget and Accounting Act, 1921, 42 Stat. 24, 25; 31 U. S. C. 46, 52 (e), and to 4 CFR 12.2 (a), I hereby certify that the annexed documents, numbered 3–1 to 3–11, inc., are true copies of the official documents now on file in the General Accounting Office in the following case: California Eastern Line, Inc., R. A. Nicol & Co., Inc., Agents.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 18th day of April in the year 1950 at Washington.

By direction of the Comptroller General of the United States.

[SEAL]

R. F. MARTIN,
Chief Clerk,
General Accounting Office.

Exhibit 69

Standard Form No. 1034—Rev. Form approved by Comptroller General, U. S. May 25, 1933 (Gen. Reg. No. 51, Supp. No. 7)

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

P. O. Pass. No. 858000

Re. Pass. No. .....

GENERAL ACCOUNTING OFFICE PREAUDIT

Certified for payment in the sum of $.....

Comptroller General of the United States

By .....

U. S. War Shipping Administration
(Department, bureau, or establishment)

Voucher prepared at New York, N.Y. Oct. 5, 1942
(Give place and date)

THE UNITED STATES Dr.

To Gafford Eastern Line, Inc.
H. A. Nicol & Co., Inc. Agents
(Payee) 3107 OCT 26 42

Address 17 Battery Place, New York, N.Y.

Payee's Account No. WSA-DA-43

PAID BY

C. F. ALLEN, CHIEF DISBURSING OFFICER TREASURY D PAYMENT SYMBO 223-13
(For use of Paying Office)

No. and Date of Order	Date of Delivery or Service	Articles or Services (Enter description, item number of contract or general supply schedule, and other information deemed necessary) Terms ..... % Discount Cash ..... days	Quantity	UNIT PRICE Cost	UNIT PRICE Per	AMOUNT Dollars	AMOUNT Cts.
		Brought forward from continuation sheet(s)					
		S.S. "YELLOWSTONE" Voy. #13 (Red Sea)					
Charter Party May 29, 1941	W. S. A. No. 1503	Crew overtime for account of charterers, as per detailed payrolls attached				233.80	
		Soc.Sec.Tax - 1% on 233.80				2.33	
					Total	235.	78

Shipped from ..... to ..... Weight ..... Government B/L No. .....

I certify that the above bill is correct and just; that payment therefor has not been received; and that except as otherwise noted all of the articles, materials, and supplies furnished under purchase order No. ..... if unmanufactured articles, materials, and supplies, have been mined or produced in the United States, and if manufactured articles, materials, and supplies, they have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

*Payee .....
(Sign original only)

Per .....

(Payee must NOT use this space)

Differences .....

Account verified; correct for 235. 78

(Signature or initials) M. M.

Contract No. ..... Date ..... Req. No. ..... Date ..... Invoice Rec'd .....

Pursuant to authority vested in me, I certify that the above articles were received in good condition, after due inspection, acceptance, and delivery prior to payment as required by law, or the services were performed as stated, that they were procured under the contract numbered above or the unnumbered contract attached hereto, or that they were procured without written contract, in open market, and with or without advertising, under the circumstances stated in No. ..... of "Method of or Absence of Advertising" shown on reverse hereof, and were necessary for the public service, and that the prices charged are just and reasonable and in accordance with the agreement.

*Approved for $ 235.78

(Sign original only)

DISTRICT AUTHORIZING OFFICER

Title STEPHEN H. ELLIOT
PORT CAPTAIN
NORTH ATLANTIC DISTRICT

ACCOUNTING CLASSIFICATION (for completion by Administrative Office)

Appropriation symbol, project symbol	Appropriation title	Limit'n or Proj't Amount	Appropriation Amount
	11/500. (05) Operating Adm.		

Allotment symbol	Amount	Encumbrance liquidated	COST ACCOUNT Symbol	COST ACCOUNT Amount	OBJECT OF EXPENDITURE Symbol	OBJECT OF EXPENDITURE Amount
		42136 772				

Paid by | Check No. 5027 dated ....., 19..., for $..... | on Treasurer of the United States in favor of payee named above.

Cash, $..... on ....., 19..... *Payee .....
(Sign original only)

Per .....

Title .....

* When a voucher is signed or countersigned in the name of a company or corporation, the name of the person signing, and the fact that he signs for the company or corporation, must be shown. For example, if the payee is a corporation, the voucher must be executed by the president or other person authorized to execute vouchers for the corporation. If a voucher is executed by a member of a firm, the name of the firm must be signed by the member executing the voucher. If the payee is described in the voucher by a trade name, the voucher must be executed by the individual, firm, or corporation trading under the name. If the payee is a fiduciary, the voucher must be executed by him in his fiduciary capacity. If the payee is a minor, the voucher must be executed by his parent or guardian or other person who has furnished the bond required by law for the receipt of the money. If the payee is a deceased person, the voucher must be executed by the legal representative of his estate. If the payee is a married woman, she must sign her own name, not that of her husband. If the payee is a public officer, he must sign his official title. If the payee is a corporation, the voucher must show the State of incorporation. If the payee is a partnership, the voucher must show the names of the partners composing the firm. If the payee is a trustee, the voucher must show the name of the trust. If the payee is a guardian, the voucher must show the name of the ward. If the payee is a minor, the voucher must show the name of the parent or guardian. If the payee is a deceased person, the voucher must show the name of the legal representative of his estate. If the payee is a married woman, she must sign her own name, not that of her husband. If the payee is a public officer, he must sign his official title. If the payee is a corporation, the voucher must show the State of incorporation. If the payee is a partnership, the voucher must show the names of the partners composing the firm. If the payee is a trustee, the voucher must show the name of the trust. If the payee is a guardian, the voucher must show the name of the ward.

S. O. [illegible] 16-1718

3-1(24)

247

1-8

RECEIVED
DISBURSEMENTS SECTION
OCT 16 1942
DIVISION OF FINANCE
U. S. MAR. COMM.

METHOD OF OR ABSENCE OF ADVERTISING

(Sec. 3709 of the Revised Statutes)

1. After advertising in newspapers.

2. (a) After advertising by circular letters sent to ..... dealers.

(b) And by notices posted in public places.

(If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate on the face of the voucher must be "2(a)(b)" or "2(a)", depending on whether or not notices were posted.)

3. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.

4. Without advertising in accordance with .....

5. Without advertising, it being impracticable to secure competition because of .....

.....

.....

.....

.....

(Here state in detail the nature of the exigency or circumstances under which the securing of competition was impracticable under 3 and 4)

NOTE.—The above form "Method of or Absence of Advertising" is to be used when purchases are made or services secured under proper authority without written agreement in any form. In case of a written agreement (formal contract, proposal, and acceptance, or less formal agreement) Standard Form No. 1036—Revised should be used for abstracting the method of or absence of advertising and award of contract. (See General Regulations No. 51, Supplement No. 6, General Accounting Office, Aug. 20, 1930.) 16—1781

248

249 BRITISH MINISTRY OF WAR TRANSPORT

Representative in the U. S. A.
25 Broadway, New York

October 9th, 1942

Mr. J. F. Keating
District Auditor
U. S. War Shipping Administration
39 Broadway
New York, N. Y.

SS "VERMONT"—Crew Overtime
Red Sea Charter, 5/29/41

Dear Mr. Keating:

We refer to your favor of the 30th ultimo in regard to crew overtime claim for this vessel. The owners have amended their claim in accordance with your audit and same is attached herewith together with public voucher in the amount of $295.78.

It seems to us that you may require additional copies of the new invoice unless you are prepared to amend copies of the old invoice which is also returned with the various supporting pape s.

Our letter of certification is attached to this claim and we shall be glad to hear that you are passing same for payment.

Yours faithfully,

W. E. TURNER,
For Director.

WHJ:T:GM
Enc.

250 BRITISH MINISTRY OF WAR TRANSPORT

Representative in the U. S. A.
New York, N. Y.

October 9th, 1942

To: U. S. War Shipping Administration
Washington, D. C.

We hereby acknowledge receipt of the services and supplies afforded to the vessel "VERMONT" at the port of between the dates May 26th & August 23rd, 1941, procured pursuant to the provisions of Public

Law 11, 77th Congress, approved March 11, 1941, in full satisfaction of crew overtime for above period, "VERMONT" being covered by requisition No. 1503 (Form 1), filed pursuant to said act.

This receipt is not a representation or an appraisal of the value of the services and supplies so received.

HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM

By WILLIAM BOPE,
For and on Behalf of Ministry of War Transport.

STATEMENT

NEW YORK, October 5, 1942

British Ministry of War Transport

25 Broadway

New York, N.Y.

IN ACCOUNT WITH

CALIFORNIA EASTERN LINE, Inc.

R. A. NICOL & CO., INC., Agents

17 BATTERY PLACE

S.S. "VERMONT" Voy. #13 (Red Sea	REQ. NO. 1503
Charter Party dated May 29, 1941	
Crew overtime for account of Charterer, as per detailed payrolls attached	293.85
Soc.Sec.Tax - 1% on $193.20	1.93
	$295.78

Payment Verified
in amount of 295.78
WAG Rawlerson
AUDITOR - U.S.M.C.

This invoice has been audited and is approved for the amount of $295.78

WAG Rawlerson
Auditor, U. S. M. C.

3-4

251-253

STATEMENT

NEW YORK, March 2, 1942

British Ministry of War Transport

25 Broadway

New York, N.Y.

IN ACCOUNT WITH

California Eastern Lines, Inc.

R. A. NICOL & CO., INC., Agents.

17 BATTERY PLACE

S.S. "VERMONT" Voy. 1-Red Sea
Charter Party dated May 29, 1941

To crew overtime handling cargo for Charterers:

Overtime	97 85	~~$116.00~~
Social Security Tax @ 1%	1.93	~~1.16~~
	# 99578	~~$117.00~~

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254-258

259 EXHIBIT 70

UNITED STATES MARITIME COMMISSION

New York, N. Y.

June 27, 1941.

States Steamship Company
17 Battery Place
New York, N. Y.

Attn: Mr. R. A. Nicol, President

GENTLEMEN:

In connection with future sailings of your vessels to Red Sea ports, it will be appreciated if you will instruct the Masters to call at the Port Director's Office, U. S. Navy, 14th Floor, 17 Battery Place, New York City, for routing instructions.

This cancels our previous instructions whereby the Masters were directed to call at the U. S. Navy, 50 Church Street, New York City and the British Navy at 25 Broadway, New York City.

We would appreciate an acknowledgment of this communication.

Very truly yours,

(S.) GRANVILLE CONWAY,
District Manager,
North Atlantic District.

260 EXHIBIT 71

UNITED STATES MARITIME COMMISSION

New York, N. Y.

June 28th, 1941.

States Steamship Company
17 Battery Place
New York, N. Y.

Attn: Mr. R. A. Nicol

GENTLEMEN:

It will be necessary to advise our Washington office in connection with the Bunkering schedule of all vessels already sailed to the Red Sea area and to keep them advised of all vessels scheduled to sail to that area.

Please therefore, at the earliest possible date send this office in duplicate, a record of the Bunker Schedule for each vessel which you have already sailed to the Red Sea area, and continue the practice for all vessels which will sail.

We would appreciate your close cooperation in regard to this.

Very truly yours,

(S.) GRANVILLE CONWAY,
District Manager,
North Atlantic District.

261 EXHIBIT 72

June 30, 1941

Capt. Granville Conway
United States Maritime Commission
45 Broadway
New York, N. Y.

Bunker Schedule—Red Sea Ships

DEAR SIR:

In compliance with request contained in your letter of June 28, we are enclosing bunker schedules on the Steamers VERMONT, TEXAS and ILLINOIS.

Yours very truly,

R. A. NICOL & CO., INC.
President.

262 EXHIBIT 73

CONFIDENTIAL

September 30, 1942

The Honorable
Lindsay C. Warren
Comptroller General of
the United States
Washington, D. C.

MY DEAR MR. WARREN:

Subject: Space Chartered Voyages to the Red Sea

As you probably know, the Commission authorized various Owners of vessels to enter into so-called space charters with the British Ministry of War Transport largely for

the carriage of Lend-Lease materials to the Red Sea. The charter hire paid to Owners is charged against Lend Lease funds as also are demurrage, loading and discharging costs and certain port expenses. The Charter Agreement covered only the outward leg of such voyages, the return voyage being for the account of the Owners. The charter rate provided for the payment of 75¢ per bale cubic foot of under-deck capacity of the vessels and 60¢ per cubic foot for cargo carried on deck. This rate subsequently was reduced to 60¢ per bale cubic foot for under-deck capacity with no allowance for deck loads. Approximately 106 voyages were undertaken on this basis during the period May to December 1941.

We have been making an investigation of the results of these voyages and have accumulated considerable data with respect to 68 of these voyages, and have requested from the respective Owners figures reflecting the results of the remaining voyages. Because of the disruptions of sails, etc., and the comparatively recent termination of some of the voyages, considerable time may yet elapse before all final accountings have been received.

The results of the 68 voyages examined indicate very definitely that excessive profits have accrued to the Owners of the vessels under these space charter agreements. I am of the opinion that recoveries of some of these excessive profits should be effected, if such is possible. With this in mind, I have referred the matter to our General Counsel for study and a report as to whether or not these contracts may be renegotiated under Section 403 of Public Law
263 528. If I am advised in the negative in this respect, I propose to call together a group representing the principal Owners of these vessels with a view to obtaining voluntary recoveries of a part of the aforesaid excessive profits.

All of the data and information accumulated by this office in connection with the subject matter is available to your representatives, and following their study of the results of these voyages, any suggestions that you may have to offer with respect to a procedure which will result in the recovery of excessive profits from these space charter voyages will be given very careful study and consideration.

Your advice is earnestly desired.

Sincerely yours,

(Signed) E. S. Land,
E. S. Land,
Chairman.

264 EXHIBIT 74

COMPTROLLER GENERAL OF THE UNITED STATES
Washington

October 9, 1942

A-51647
The Chairman,
United States Maritime Commission.

MY DEAR ADMIRAL LAND:

There has been received your letter of September 30, 1942, as follows:

"As you probably know, the Commission authorized various Owners of vessels to enter into so-called space charters with the British Ministry of War Transport largely for the carriage of Lend-Lease materials to the Red Sea. The charter hire paid to Owners is charged against Lend-Lease funds as also are demurrage, loading and discharging costs and certain port expenses. The Charter Agreement covered only the outward leg of such voyages, the return voyage being for the account of the Owners. The charter rate provided for the payment of 75¢ per bale cubic foot of under-deck capacity of the vessels and 60¢ per cubic foot for cargo carried on deck. This rate subsequently was reduced to 60¢ per bale cubic foot for under-deck capacity with no allowance for deck loads. Approximately 106 voyages were undertaken on this basis during the period May to December 1941.

"We have been making an investigation of the results of these voyages and have accumulated considerable data with respect to 68 of these voyages, and have requested from the respective Owners figures reflecting the results of the remaining voyages. Because of the disruptions of mails, etc., and the comparatively recent termination of some of the voyages, considerable time may yet elapse before all final accountings have been received.

"The results of the 68 voyages examined indicate very definitely that excessive profits have accrued to the Owners of the vessels under these space charter agreements. I am of the opinion that recoveries of some of these excessive profits should be effected, if such is possible. With this in mind, I have referred

the matter to our General Counsel for study and a report as to whether or not these contracts may be renegotiated under Section 403 of Public Law 528. If I am advised in the negative in this respect, I propose to call together a group representing the principal Owners of these vessels with a view to obtaining voluntary recoveries of a part of the aforesaid excessive profits.

265 "All of the data and information accumulated by this office in connection with the subject matter is available to your representatives, and following their study of the results of these voyages, any suggestions that you may have to offer with respect to a procedure which will result in the recovery of excessive profits from these space charter voyages will be given very careful study and consideration.

"Your advice is earnestly desired."

Your attention is invited to section 403(c) of the act of April 28, 1942, Public 528, which, in part, is as follows:

"* * * This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contained a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act."

Many of the payments appear to have been made prior to April 28, 1942, the date of approval of the act, supra.

I am pleased to accept your tender of cooperation in the matter and will appreciate a copy of the report showing the results of the present inquiry.

Sincerely yours,

(S.) LINDSAY C. WARREN,
Comptroller General
of the United States.

266 EXHIBIT 75

Proceedings of the United States Maritime Commission, November 19, 1942 (Special Meeting)

Present: Chairman Land and Commissioners Carmody and Woodward, a quorum. (Commissioners Vickery and Macauley absent on official business.)

Also Present: Wade H. Skinner, general counsel; R. E. Anderson, Director of Finance; Joseph M. Quinn, Assistant Director of Finance; William Radner, general counsel of War Shipping Administration; D. F. Houlihan, Director of Fiscal Affairs, War Shipping Administration; and W. C. Peet, Jr., secretary.

Appearances: John Burns, Ira Ewers, E. P. Farley and D. S. Morrison, John McAuliffe and Walter Wells, John Slater, Roscoe Hupper, Harry Warley, T. E. Cuffe and Wm. Bush, Edward Roberts, and John Mann, and C. L. Groom.

The Commission convened at 2:30 p. m. and adjourned at 3:30 p. m.

Red Sea Space Charters

Chairman Land made the following statement with respect to the Red Sea space charters:

"Red Sea Space Charters

"I have asked you gentlemen to meet with me today to discuss the so-called Red Sea space charters which were entered into by various steamship owners with the British Ministry of War Transport during 1941 for the purpose of carrying lend-lease goods to the Red Sea and Persian Gulf. As you gentlemen know, the rates prescribed in these space charters were approved by the Commission, as was also the form of space charter.

"At the beginning, that is, from May 1941 through September 14, 1941, the rates were 75 cents per bale cubic foot of the entire under-deck space and 60 cents per bale cubic foot for all cargo carried on deck. This was later changed, and, commencing with all voyages beginning on and after September 15 through December 1, 1941 (when this form of charter party was discontinued), the rate was reduced to 60 cents per bale cubic foot for the entire underdeck space and with no allowance for the on-deck cargo.

"Various members of the staff of the Maritime Commission, and, I might say, some of the Commissioners have always felt that these rates were too high, and for that reason we have been continously reviewing the results. Just recently the Comptroller General of the United States has started a thorough investigation of these Red Sea voyages. From our investigation we now are convinced that the rates were too high, and exceedingly so, and it is my feeling that the various steamship owners should voluntarily make a refund, thereby remedying the situation. If this is not done, no doubt the Comptroller General will re-

port the results to the Congress, and you may be assured that we will be confronted with an investigation by
267 some committee, with results which, in my opinion, will be injurious to the American merchant marine.

"We have been unable to obtain from the various owners all of the voyage results of the 106 voyages which participated in these Red Sea charters. However, we have received the information from the owners for 76 voyages. Charter hire paid on these 76 voyages amounted to in excess of $26,000,000 and revenue obtained from other sources amounted to approximately $16,000,000. The direct-voyage profit to the owners on these 76 voyages amounted to in excess of $22,000,000. Based on the deadweight tonnage represented by these 76 voyages, and assuming an average turn around of 183 days, this produces a return of over 80 percent per annum on an assumed value of $75 per ton. This assumption, on our part, of a $75 valuation per deadweight ton would hardly be recognized by the Comptroller General of the United States, who, no doubt, would point out that a calculation based on the book value of the various vessels would show an unconscionable rate of return.

"It would be a very wise step, I believe, for the steamship owners to agree voluntarily to a revision of the rate, and in that connection we have the following (three) suggestions:

"1. In lieu of the space charter hire rate hereinbefore mentioned, substitute the rate of hire published by the United States Maritime Commission in Press Release 970, on a time form basis, and add thereto 30 percent to cover charterer's expenses to be assumed by the owner. As a matter of information, this rate, on a vessel of between nine and ten thousand deadweight tons, would amount to approximately $6 per dead-weight ton per month.

"2. As is pointed out above, the space charter rate was reduced from 75 to 60 cents per bale cubic foot, which seems to substantiate the fact that the 75 cent rate originally established was too high. I have formed the opinion, after talking to the various steamship owners, that when a vessel is fully loaded broken stowage usually amounts to about 20 percent. Results of the Red Sea operations indicate broken stowage on these vessels ranging from 20 percent to 49 percent. It is suggested that the rate be reduced from 75 and 60 cents per bale cubic foot of the underdeck cubic capacity of the vessels to 60 cents per bale cubic foot for 80

percent of the entire underdeck cubic capacity of the vessels, with no allowance for on-deck cargo.

"3. In lieu of the space charter hire rate hereinbefore mentioned, substitute the rate of hire published by the United States Maritime Commission in press release 970 and add thereto $2.70 per deadweight ton per month, representing charterer's expenses absorbed by owners under the provisions of the space-charter agreement. As a matter of information, on a vessel of between nine and ten thousand deadweight tons, this would produce a time-charter rate of $7.30 per deadweight ton per month."

268 Chairman Land then invited the representatives of the steamship companies present to designate one person or a small group to work out a solution along the lines suggested in the foregoing statement with a member of the Commission's staff.

The representatives of the steamship companies agreed to take this matter under consideration and to advise Chairman Land of their action thereon.

By the unanimous "yea" vote of the members present, the meeting adjourned at 3:30 p. m.

269 EXHIBIT 76

March 22, 1943.

Hon. Edward J. Hart,
Chairman, Special Subcommittee on Charter Rates,
Committee on the Merchant Marine and Fisheries,
House of Representatives.

DEAR CONGRESSMAN HART:

The Maritime Commission desires to present to your committee information which may be helpful in its consideration of the charter rates paid for voyages to the Red Sea in the summer and fall of 1941.

The commission has asked the owners who took part in these voyages to agree, voluntarily, to a revision of the charter rates paid and to make a refund to the Government thereon. Attached is a copy of the statement made to representatives of the owners who met with the Commission on November 19, 1942. The owners agreed to take the matter under consideration, but no action thereon has been taken by them.

The Red Sea voyages in question represent the first arrangements of their kind undertaken by the Maritime Commission. The sailings began in the early part of May 1941 and were continued for several months thereafter.

The President had directed the Commission a few weeks before the Red Sea voyages were authorized to assemble a pool of 2,000,000 tons of merchant shipping for use in the national-defense effort. The Commission thereupon set about to obtain the necessary shipping through voluntary arrangements with the owners. Vessels needed by the armed services for conversion were purchased, while ships needed for cargo transportation were obtained, as far as possible, on a charter basis, bare boat and time charters predominating.

The assembling of this pool of shipping was barely under way when the Commission was directed to make available to the British Ministry of War Transport enough ships to transport quantities of material from the United States to Suez and vicinity via the Red Sea. The task was most urgent because of the military situation in north Africa at the time.

The Commission did not pay the charter hire, in this instance or others, at the time under discussion. It approved the rates to be paid. In obtaining the use of ships on a voluntary basis, the Commission undertook to correlate and direct traffic. Charters were made between the shippers and the owners. The Maritime Commission organized the schedules, spotted the cargo and loading berths, and approved the charter rates. Its control was exercised by indirection. In the case of the Red Sea voyages, the ships were chartered by their owners to the British Ministry of War Transport. The charter hire was paid out of lend-lease funds allocated for the purpose, presumably on account of the problem of exchange involved.

A combination of factors led the Maritime Commission to adopt the space charter form for the Red Sea voyages instead of the bare-boat or time charter forms more commonly used by it.

The nature of the cargo to be carried was perhaps the primary factor, when considerd in connection with the speed with which the undertaking had to be set in motion.

270 The British Purchasing Commission had bought quantities of war equipment and supplies in the United States. The Red Sea voyages were undertaken in order to get as much of this material to Africa as might be assigned to that theater of operations. The items were as diverse in nature as the needs of an expeditionary force would require.

Under the usual space charter arrangement, the shipper

paid on the basis of the total cubic content of the ship, delivering to the vessel whatever he wanted to go, and the vessel owner took care of all expenses of loading and discharging. The device was suited to the needs of the Red Sea movement, since it would permit prompt sailings with a minimum of detail in determining rates. Space charters were being used to some extent at the time by commercial operators for similar voyages.

American vessels, restricted in their movements by the Neutrality Act of 1939, had not theretofore gone into waters potentially as dangerous as the Red Sea. Neither had they carried ammunition and explosives in such quantities as were included in these shipments. No one knew the actual hazard in the undertaking. Events proved that the actual hazard was less than anticipated.

The largest factor in judgment from the standpoint of hazard was the risk of delay. War-risk insurance was available to cover the loss of or damage to a ship resulting from hostilities, but the owners had to assume the risk of extensive delays in the return of their ships.

Ships were then at the peak of their earning power. Replacements for ships lost were hard to find and the cost high. If a ship should be damaged at some place where repairs were difficult or impossible to obtain, the owner lost the use of the vessel during the delay in its repair and return.

The risks of delay were intensified by factors other than the dangers of loss or damage resulting from attack. Ships sometimes had to unload at Red Sea or damage resulting from attack. Ships sometimes had to unload at Red Sea ports that were inadequately equipped. They had to sail in unfamiliar and poorly charted waters to reach such ports, and might have to sail under black-out conditions to reach them.

Another important consideration was the uncertainty of return cargo.

American demand for strategic and critical materials meant that there was cargo to be carried, but the movement of such cargo had not been fully organized and coordinated. The Commission had undertaken to control inward cargo and rates thereon, but it was unable to advise a ship operator in May or June 1941 that after his vessel had unloaded in the Red Sea it could obtain a return cargo at a specific point.

There was no return cargo to be had in the Red Sea. The distances from Port Said to the ports at which return cargo

might be had are considerable. From Port Said to Colombo is 3,500 miles; to Beira, 4,000 miles; to Calcutta, 4,700 miles; to Singapore, 5,000 miles. It is 1,400 miles from Port Said to Aden, at the other end of the Red Sea. A
271 ballast voyage of considerable length was therefore indicated before a ship could be placed on a homeward loading berth.

Under these conditions, it appeared advisable to approve charter rates on a one-way basis, so that the owners could and would undertake the voyages, assuming the risks of time and delay.

Commercial rates current at the time for voyages of comparable length amounted to $1 or more per cubic foot. Such rates yielded an enormous return. We were close to the situation that obtained during World War I when a vessel paid for itself with a single voyage, if it made a safe return.

The Maritime Commission had no legal control over charter rates (except the powers of secs. 9 and 37 of the Shipping Act of 1916, which were of limited application) until after the adoption of the Ship Warrants Act, which was approved on July 14, 1941. In the course of the hearings on that legislation prior to its passage the Commission pointed out that ship earnings were very high and in danger of getting out of hand.

When the Commission undertook to organize the Red Sea voyages, ship earnings were at their peak, as heretofore noted. The owners were in a position to demand $1 or more per cubic foot for commercial cargoes to the Red Sea.

The cost of loading and discharging these Red Sea vessels was to be assumed by the British Ministry of War Transport, thereby relieving the owners of an expense normally borne by them under the above-quoted $1 rate. It was also estimated that the cargoes to be carried, because of the nature of the items to be shipped, would leave about 20 percent open space in the vessel which could not be utilized.

The Maritime Commission took the position that inasmuch as this amount of free space was greater than normal, a deduction of 20 per cent from the going rate should be made. This modification, with a 5-percent deduction for the stevedoring provided by the shipper, made the rate 75 cents per cubic foot.

The owners demurred, contending that the commercial rate was $1 or more, that their vessels were in no different position than any other neutral vessels, and that they should be paid on the commercial basis making allowances only for

the cargo expense assumed by the shipper. The Commission was unwilling to approve the going rate for this purpose, considering it too high, particularly in view of the anticipated volume of the business.

The alternative would have been requisitioning. The Commission wanted to avoid, or at least to postpone, the application of section 902 until there had been a further opportunity to effect a reduction of ship earnings and values. The Commission was intent upon effecting a downward revision of the whole structure of rates and values before resorting to requisition.

272 The Commission therefore insisted upon the downward adjustment of the space-charter rate, and finally the owners acquiesced in it.

The actual experience with the Red Sea venture proved that the hazards of war were not so great as had been feared, that the delays encountered were not extensive on the average, and that the operators obtained return cargoes with relative ease and in substantial volume. The time element which loomed so large when the voyages were undertaken did not prove a material handicap in the majority of cases, although some losses were incurred. As a result, the returns to most of the owners who made the Red Sea voyages were completely out of line with what had been anticipated.

In august 1941 the Commission required a downward revision in the space charter rate from 75 cents to 60 cents per cubic foot and the elimination of any payment for cargo carried on deck.

The Red Sea operation is the only instance in which the Commission made extensive use of the space charter arrangement. It has preferred to use bare-boat and time charters, the rates for which have been brought pretty well into line, in the opinion of the Commission, although those rates were also very high when the Commission initiated its effort to scale ship values and charter hire downward.

Attached is a chart showing the fluctuations of world time charter rates from the third quarter of 1939 to the first quarter of 1942. As indicated therein, vessel earnings improved immediately after the outbreak of the war in September 1939, but it was not until near the end of 1940 that the inflationary effect of war conditions on merchant shipping began to be conclusively evident. Then, within less than 6 months, world-time charter rates went up from a point less than $4 per deadweight ton per month to a figure above $10 per ton per month.

The Commission had begun its efforts toward reduction

of values and rates only a few weeks before the date shown on the chart at the peak of time charter rates, which occurred just about the time the President's proclamation of unlimited national emergency (may 27, 1941) made the powers of section 902 operative. The chart therefore indicates graphically the reason for the Commission's desire to avoid, or at least to postpone, the use of its powers to requisition vessels.

The effort to assemble a pool of 2,000,000 tons of merchant shipping, and the control which the Commission has assumed over the traffic in strategic and critical materials gave it some bargaining power, which it used to the utmost of its ability, while the ship warrants law was pending. One instance of this use is reflected in the establishment of the Red Sea charter rates.

As soon as the Ship Warrants Act was approved, the Commission brought about a drastic reduction in time charter rates, as indicated by the scale of rates set forth in the Commission's Press Release 979 on July 30, 1941, a copy of which is attached. While the new rates became effective only as charters were made after that date, they were responsible in large measure for the continued downward revision of charter rates, as reflected in the
273 curve on the chart, and for making it possible for the War Shipping Administration to stabilize charter rates at a reasonable level in the spring of 1942.

A further reduction in rates had been initiated in January 1942, as shown by the Commission's Press Release 117, a copy of which is attached.

By significance of the Commission's actions in regard to charter rates is apparent from a comparison of current rates with the rates paid during World War I and during the present conflict before measures of control became effective.

Referring again to the chart, it will be seen that although world-time charter rates went from $4 per ton per month in December 1940 to more than $10 per ton per month in May 1941, they were brought down again to their 1940 levels by the end of 1941. If controls had not been applied, there would undoubtedly have been further and pronounced inflationary effects after the Japanese attack on Pearl Harbor.

During World War I the Shipping Board paid more than $4 per ton per month for vessels on bare-boat charter. The Court of Claims later allowed the owners $6.60 per ton per month as just compensation for the bareboat rate. The

Commission and the War Shipping Administration have been able to hold the bare-boat charter rates down to a level of $1 to $1.50 per ton per month, which is not appreciably higher than 1939 pre-war earnings in many instances.

When the War Shipping Administration initiated extensive requisitioning of vessels for use in the war effort a year ago, the general structure of charter rates and ship values had been restored to the levels of 1940.

The owners who took part in the Red Sea venture are still participating in the war effort on the basis of the stabilization herein described, subject only to the Comptroller General's decision of November 28, 1942, concerning which the War Shipping Administration is still negotiating.

If there is any further information your committee desires in connection with this matter, the Commission will be glad to furnish it.

E. S. LAND,
Chairman.

274 EXHIBIT 77

March 25, 1943.

E. S. Land, Chairman
United States Maritime Commission
Washington, D. C.

Reference is made to your letter of September 30, 1942, and my reply thereto dated October 9, 1942, relating to certain space charters between the British Ministry of War Transport and American owners of vessels for the carriage of lend-lease material to the Red Sea, which charters were approved by an official of the Maritime Commission.

An examination by representatives of this office of the records in connection with 56 of the total of 106 voyages indicates the average voyage profit to be approximately $300,000, on the basis of which the total voyage profit will amount to approximately $30,000,000 for the 106 voyages involved. A tentative statement prepared by representatives of the Commission indicates a voyage profit of $26,603,341.50 for 89 of a total of 90 voyages performed by privately owned vessels, or approximately $300,000 per voyage. If is understood that 16 of the voyages were performed by Government-owned vessels on which the voyage profit will be approximately $4,500,000.

When the report referred to in the last paragraph of my letter of October 9, 1942, is prepared, it is requested that the net book value and voyage days for each of the vessels be reflected herein.

It is also requested that this office be advised as to the

amount of profits accruing on the 16 voyages performed by Government-owned vessels and the appropriation or fund into which deposited.

Your cooperation in the matter will be appreciated.

Sincerely yours,

R. N. ELLIOTT,
Acting Comptroller General
of the United States.

275 EXHIBIT 78

March 29, 1943.

R. N. Elliott,
Acting Comptroller General of the United States
Washington, D. C.

This will acknowledge the receipt of your letter of March 25, 1943, referring to my letter of September 30, 1942, and your reply thereto, dated October 9, 1942, relating to certain space charters between the British Ministry of War Transport and American owners of vessels for carriage of lend-lease material to the Red Sea.

As indicated in my letter of September 30, 1942, the matter was referred to counsel, who advised that the application of the renegotiation statute was doubtful (1) as to all of the charters because the United States was not a party thereto, and (2) as to those charters on which final payments had been made prior to the enactment of the renegotiation act.

On November 19, 1942, a number of the owners (or their representatives) who took part in the venture met with the Maritime Commission, at the Commission's invitation. A copy of the statement made to the owners at that time is attached.

The owners' response to this proposal being unsatisfactory, I brought the situation to the attention of the chairman of the Committee on the Merchant Marine and Fisheries of the House of Representatives, as a subject for consideration by the committee under its special powers of investigation.

As you no doubt know, hearings on the Red Sea charters were begun by a Special Subcommittee on Charter Rates of the House Committee on the Merchant Marine on March 23, 1943.

At the opening session of the hearings, counsel for the committee identified and submitted for the record a series of exhibits taken from the files of the Maritime Commission, which exhibits had been used by the committee staff as the basis for the tabulations and computations contained in

committee document No. 7, offered in evidence as exhibit No. 6. A copy of the document is enclosed.

As stated in my letter of September 30, 1942, all of the data and information accumulated by this office in connection with the subject matter is available to your representatives. I am informed that the material supplied to the committee staff from the files of the Commission has been reviewed by representatives of your office, and that copies of part if not all of it were furnished them.

In view of the fact that the hearings above described are under way, no additional report is contemplated by the Commission at this time.

276-278 Audits have not been completed on the 16 voyages performed by Government-owned vessels, because of delays in receiving some of the information relating to voyage returns. When the audits are completed, I shall be glad to furnish your office with the information you have requested concerning them.

Sincerely yours,

E. S. LAND,
Chairman.

279 Met, pursuant to notice, at 10:05 o'clock a. m.

Before Hon. ARNOLD RAUM, Judge

APPEARANCES:

HAROLD B. FINN, Esq., 120 Broadway, New York, New York, and

ROBERT E. KLINE, JR., Esq., 322 Munsey Building, Washington, D. C., for the Petitioner.

FREDERICK N. CURLEY, Esq., and

JAMES H. PRENTICE, Esq., United States Department of Justice, for the Respondent.

280 PROCEEDINGS

The CLERK: Docket No. 870-R, California Eastern Line, Inc.

State your appearances, gentlemen.

Mr. CURLEY: Frederick N. Curley and James H. Prentice for the Respondent.

Respondent is ready, your Honor.

The COURT: Off the record.

(Discussion off the record.)

The COURT: On the record.

Mr. FINN: Harold B. Finn and Mr. Robert E. Kline appearing for the Petitioner.

May it please the Court, this is a proceeding under the Renegotiation Act for redetermination of alleged excessive profits. However, the purpose of today's hearing is to consider only the basic issue of whether the specific contract from which the profits were derived was a contract covered by the Renegotiation Act and subject to renegotiation thereunder. This basic issue, on Petitioner's motion, has been severed from the other issues of the case by an order entered here on April 12, 1950.

If the Court will refer to page 20 of the Petition, you will find a copy of the specific contract which we will discuss at this hearing. There is no dispute as to the contract, which in the petition, appeared as Exhibit B, and which will
281 later be introduced in the stipulation as Exhibit 1.

You will observe that the document is a written agreement dated May 29, 1941, between California Eastern Line, owners of the Steamship VERMONT, and the British Ministry of War Transport as charterers. The British Ministry, as your Honor undoubtedly knows, is an agency of the sovereign British Government. And under Clause 1, the obligation of the petitioner as owner of the vessel was to have his vessel proceed to a loading berth at not more than two United Atlantic Coast ports and there loads cargo of lawful merchandise which the charterers, the British Ministry, agreed to furnish, and being so loaded, proceed therewith to not exceeding two ports of discharge in the Gulf of Aden and the Red Sea range. That, incidentally, is where it gets the name of the Red Sea charters which you will find all the way through here.

And on arrival thereto deliver the cargo at any such wharf or place that the British Ministry agent might direct on arrival.

And that was all of the service to be performed by the Petitioner under this contract.

As you will readily appreciate, it was a contract for transportation of the British Ministry's cargo. Now, the consideration for that was an agreed rate of freight
282 as shown in Clause 1 of the charter. It was further agreed that the entire freight was to be prepared without discount and to be considered earned and not returnable, vessel or cargo lost or not lost.

Now, if your Honor will turn to page 30 of the petition, which is the last page of the contract itself, you will see that the contract was executed by California Eastern Line, Inc., by R. A. Nicol, and for the British Ministry of War Transport, by T. A. Sparks, who was the Ministry's representative in the United States.

It will be stipulated by counsel that both of these gentlemen are duly authorized to execute the contract on behalf of their respective principals.

You will also notice that Clause 28, appearing just above the signatures, provided the charter was not to become effective until approved by the United States Maritime Commission. Now, that was a statutory requirement under the provisions of the Shipping Act of 1916 which was a World War I statute and has been carried right on through today which makes it unlawful to charter an American flag vessel to an alien, or to put it in the way of the statute, to a person not a citizen of the United States. Therefore, this contract being between an American shipowner and the alien British Ministry of War Transport, it required the approval of the Maritime Commission. And as you
283 will observe, it was approved by the Maritime Commission, or rather for the Maritime Commission by Mr. C. H. Helmbold.

It is also stipulated, or will be stipulated, that Helmbold was duly authorized by the Commission to approve the charter on behalf of the Commission.

That, your Honor, is in our opinion sufficient to show clearly without the slightest doubt that this was a contract in writing between a private American corporation on the one hand and the alien British Ministry of War Transport on the other, and that was approved by the Maritime Commission under the provisions of the contract and under the requirements of the Shipping Act of 1916.

That brings us to the first and most fundamental issue in the case, which is, whether as a matter of law, this contract was a contract with a department as defined in the Renegotiation Act. As the Court knows, the Act did not authorize renegotiation of all contracts, public or private, but limited it specifically to contracts with certain departments, and those departments were the War Department, the Navy Department, the Treasury Department, the Defense Plants Corporation, the Metals Reserve Company, the Defense Supplies Corporation, Rubber Reserve Company, and the Maritime Commission. In other words, contracts with Agriculture, Interior, and outside agencies were not specified or defined as one of the Departments.
284 For that reason, the Petitioner has contended and contends here that this contract not being with one of the named departments was not and could not be subject to the renegotiation act.

The Court: Has that issue been litigated in any other case, Mr. Finn?

Mr. Finn: That issue has been litigated and decided in a dictum sense. It has been passed upon, but I would not say that in the true sense it has been litigated and settled and decided in that respect. But I think this Court can readily appreciate that the definition of "Department" cannot be extended, and in order to bring this case within the jurisdiction of the Renegotiation Act, Respondent will have to, by some means or devious means bring it into one of those Departments.

Now, despite the language of the statute and despite the fact that Petitioner and others similarly situated tried to convince them this was not a contract with the Department, they nevertheless, in the case of the Petitioner, determined administratively that this contract was a contract with the Departments. We use the plural, and I call the Court's attention to the Respondent's order appearing on pages 18 and 19 of the petition that you have there, at about the 7th line, and you will see that he very carefully avoids identifying which Department. And I might add that the answer filed on behalf of the Respondent is equally
285 vague as to which Department.

They also, as the Respondent did, plead that this is a contract with the Departments.

Now, this renegotiation proceeding was started in 1943 and the order was not entered until 1949. And yet after those six years they still couldn't determine whether the contract was with any particular Department. But I suppose that is their privilege to be vague if they want to be. At least it does not enlighten us and won't enlighten the Court.

So far as the petitioner has been able to determine the sole basis for the respondent's finding that the contract was a contract with the Departments was the fact that the Maritime Commission, by direction of the President, paid the amounts due the Petitioner under the contract from lend-lease funds. Now, that was pursuant to an intergovernmental arrangement between Great Britain and the United States. The Petitioner was not a party to that agreement and wasn't consulted as to its terms, and the text of the agreement will appear in the record. But those funds were not Maritime Commission appropriations as such, but Lend-Lease funds appropriated to the President who allocated a certain amount to the Maritime Commission for the purpose of paying this indebtedness of the British

Ministry which included freight, demurrage, and a small amount for overtime paid to the crew.

Now, the Petitioner's second proposition of law
286 will be supported by uncontradicted evidence. The Respondents purport the renegotiation proceeding was not commenced within one year after the close of the Petitioner's fiscal year within which the completion of said contract occurred.

The COURT: That is before us today under the question of severance?

Mr. FINN: Yes, sir, that is before you today. That is a relatively simple issue.

The Petitioner's theory and contention is that the contract was completed within the meaning of the statute when they delivered the cargo at Port Sudan and went on their own way.

Now, Respondent, despite that clear-cut proposition as it appears in the contract, has come up with the idea that it really was not completed until the next fiscal year, 1942. In our case the vessel sailed from New York on May 29, 1941 and she delivered her cargo in the Red Sea on August 8, 1941. In the meantime, the owner had been paid the freight at the agreed rates, and when the cargo was delivered, I think you will agree that the British Ministry did not have any more right to performance from the owner of the vessel. It was a one-way voyage to the Red Sea, and after he discharged it was up to the owner to make his own way home on his own business any way he could get it.

The COURT: This was not a bare boat charter?

287 Mr. FINN: It was not a bare boat charter. It was a contract to carry so many tons of cargo to a certain point and leave it there. It wasn't time, it wasn't bare boat.

Now, one further defense, or rather one further objection to the Coventry Act is the question of final payment. There were three payments actuallly made under the contract. The final payment, we contend, was the payment of freight. Under the contract clause 1, the charter, the British Ministry agreed to pay us a certain number of dollars or cents per cubic foot, and to pay it right after the vessel sailed, prepaid. And while we were en route to the Red Sea, the British Ministry using the Lend-Lease funds as their bank account, caused that freight to be paid to the Petitioner. That was during Petitioner's fiscal year 1941.

That was the consideration for the contract of carrying from New York to Port Sudan. Now, we contend that that was the final payment under the contract within the meaning of the Act.

Now, during the course of the contract the vessel was delayed by the charterers in the loading and discharging beyond the ten day period, so under the contract we had a right to demurrage at a certain rate per day. That demurrage was not paid to the Petitioner until 1942, actually after April 28, 1942. We had billed before that, we had billed the British Ministry before that, and the British Ministry turned it over to the Maritime Commission, the banker, and the banker insisted on ordering it and sending it back to us several months later *if* April 28, 1942, and reduced the amount and asked us if we would take it and we agreed to take it. That was $14,700 as compared to the principal freight money of over $300,000. So you will see that that was a small part of the primary payment of the contract.

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Then, a few months later, they finally got around to ordering the overtime paid to the crew in the sum of $295.00.

The question is there what was the final payment under the contract? Was it the freight? Was it the demurrage, or was it the overtime? And that, your Honor, is sufficient to place our case before the Court.

I would like to move to make one split amendment to the petition. I don't think Respondent's counsel will object. That is merely to show in the petition that we have paid an additional amount by way of refund of alleged excessive profits.

The Court: Are you submitting a proposed amendment?

Mr. Finn: I would like to at the proper time. I don't have it ready.

Mr. Curley: This is the first time I knew you were going to amend, Mr. Finn. I don't think any statement, your Honor, is material as to how much was paid or when it was paid, and we have so plead that in our answer.

289

Mr. Finn: I don't care.

Mr. Curley: As a matter of fact, this Court on numerous occasions has said they are not interested in payments, when it was paid or how it was paid. For that reason, I object to it.

I presume Mr. Finn is talking about the payment of the determination of excessive profits; is that correct?

Mr. Finn: That is right. I don't care, it is not material to these issues. It is material to the full case, but not to this subject at issue.

The Court: At any time counsel desires, he may offer a motion to amend coupled with the proposed amendment and if the Court allows it to be filed and respondent thinks

it is immaterial and thinks it defective in any other way, he can file a responsive pleading to that effect.

Mr. CURLEY: May it please the Court, as counsel for the Petitioner has stated, this court issued an order on April 12, 1950, which granted Petitioner's motion to sever certain of the issues in this proceeding. Petitioner's counsel, at that time, that is, at the time of the argument for the motion for severance which was heard on March 1, 1950, said, among other things, and I am quoting:

> "A most persuasive consideration should be that a decision on the coverage question in the instant
> 290 case will be controlling on some fifteen other Red Sea cases which have either been or are about to be brought before this Court for determination."

Later on in his argument he states again:

> "If this Court decides the coverage question in the negative it will furnish a controlling precedent in all of these other cases, and if decided promptly will avoid the necessity of repeated argument in all similar pending or prospective litigation, some fifteen in all, as I have said."

And he went on and said:

> "I only say this is an issue identical to all of these Red Sea cases, at least fifteen cases, which are identical in contract and identical in parties. They are exactly the same and therefore at least in the fifteen cases, six of which are already here and nine on the way, it should be a controlling decision if it were decided by this Court."

Now, in view of the representations made by Petitioner's counsel and in view of the fact that the decision in this case is expected to control or have a large influence in controlling the other Red Sea cases, we feel that the evidence to be presented to this Court should include the general facts surrounding the entire Red Sea operation on charters which are similar to the petitioner's. And since this Court has severed the issues, partly on the grounds that
291 this case will be a test case and thus a leading case, we feel that it is incumbent upon us to present to this Court sufficient information concerning the operations surrounding the Red Sea voyages, and where the charters are identical as they are in this case——

The COURT: Mr. Counsel, the Court will here decide only in this case. We will consider all the evidence relevant to this case, but we are not going to consider evidence otherwise immaterial to this case merely because it might affect other similar cases.

Mr. CURLEY: Your Honor, I have been led to believe, and the reason I made this opening statement is because I understand that there will be at least maybe one, maybe two, of the other petitioners who are going to request permission to file briefs in this case.

The COURT: That is a common thing in litigation, where counsel who have similar cases are interested in filing amicus briefs. That still doesn't add to the scope of the litigation before the Court. We are here to decide this case and no other case.

Mr. CURLEY: Under a charter which is identical in form to the one used by Petitioner, your Honor, there were approximately ninety voyages to the Red Sea area involving payments of approximately $27,000,000 by the American taxpayers. These ship owers realized profits on
292 those voyages before renegotiation and in an amount in excess of $16,000,000.

In the instant case, the Petitioners' ship made one voyage to the Red Sea and from that it received gross income of approximately $351,000.

We believe that the Petitioner retained a profit from that of approximately $222,000 before renegotiation.

As a result of renegotiation proceedings, in four cases in the Red Sea area, seven companies have signed bilateral agreements. Bilateral agreements are those which the parties have entered into an agreement as to the amount of excessive profits. In the bilateral agreements there were agreements for about $3,400,000 worth of excessive profits.

In the remaining thirteen cases the Chairman of the Maritime Commission issued unilateral orders determining that that was excessive profits slightly in excess of $6,000,000. This proceeding is one of those thirteen cases.

Now, the Petitioner has mentioned in response to your Honor's question that there was one case in which by inference some action was taken, and that should be identified as the Waterman case. In the Waterman case, as your Honor more than likely knows, the question arose on a request for injunctive relief, and that all the issues as shown by the pleadings in this case were not presented to any of the courts either Federal Court or the Circuit Court of Appeals or the Supreme Court in the decision. The

293 fact is that in the Waterman case, the court did not review any of the facts which we are going to present to your Honor here.

Now, the parties have stipulated that there are three basic issues. The first issue is whether or not the charter involved herein, while on its face, executed between the British Ministry of War Transport and the ship owner, was in reality a contract or a subcontract with the Maritime Commission.

We will present evidence in this case to show, first, that all negotiations leading up to the execution of the charter parties in all of the ninety voyages were between representatives of the ship owners including petitioner and representatives of the Maritime Commission.

Secondly, we will show that there were no negotiations between representatives of the British and representatives of the ship owners including petition relative to the terms and conditions of the charter party.

And thirdly, that it was clear that the policy, or let us say the people who initiated the policy of the Red Sea operations were at a high level echelon in this country.

Fourthly, the evidence will show clearly the only function performed by the British Ministry of War Transport aside from the signing of the charter was to certify as an agent of ours, to certify to the American Government the services under the contracts were in fact rendered.

294 And of course they did forward the documents with such certification to the principal, namely, the Maritime Commission.

Fifthly, we will show that all payments to the ship owners as required by the charter parties were made by the Treasurer of the United States under invoices submitted to the Maritime Commission, and were paid for from funds appropriated by the Congress of the United States in furtherance of our national defense effort.

Now, a review of the United States statutes and presidential proclamations in force at the time of the execution of this charter clearly indicates that the Maritime Commission had the power to charter these ships either directly or indirectly in the interests of our national defense program. We believe that the stipulated documentary evidence will on its face clearly prove that the British Ministry of War Transport was merely an instrumentality used by the Maritime Commission to enter into contracts for the Red Sea operations.

In fact, the evidence will show that the British Government considered its position in this operation as being merely an agent for the American Government.

This Court, in prior opinions, has made it clear that the test of renegotiation ability is whether or not the funds employed for the payment of the contract, or the sub-
295 contract involved, and being renegotiated, were approximated by the United States Congress. The evidence will be presented which will show that the source of the funds used to pay these charters was in fact appropriated by the United States Congress and paid for by American ship owners.

The second issue is whether the contract or charter party involved is subject to renegotiation under the terms of the Renegotiation Act as amended. Section 403 (c) (6) of this Act states that it shall be applicable to all contracts and subcontracts unless final payment pursuant thereto was made prior to April 28, 1942. The stipulated evidence will show that approximately $15,000 was in fact paid by the Maritime Commission through the Treasurer of the United States to the Petitioner during July and October of 1942 under the terms of the charter party involved in this proceeding.

The third basic issue involved in this proceeding is whether the Chairman of the United States Maritime Commission as head of one of the Departments named in the Renegotiation Act of 1942 as amended properly exercised his statutory discretion in determining that the charter of the petitioner was completed or terminated during the petitioner's 1942 fiscal year.

Now, the provisions of that statute I would like
296 to read for your Honor, and that is Section 403 (c) (6), the last paragraph of the 1942 statute:

> "No renegotiation of the contract price pursuant to any provisions thereof or otherwise shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or the subcontractor within which completion or termination of the contract or subcontract was determined by the Secretary occurs."

We believe that the Chairman properly exercised the discretion that is given to him in that statute in determining that the contract involved herein was completed or terminated in the fiscal year 1942, namely, the year in which final payment was made.

Now, your Honor, I would just like to point out one point here that Petitioner has stated that we have alleged departments in our answer. If your Honor will turn to page 3 of the amended answer, subparagraph (c) it states:

> "The Respondent denies the allegations contained in the first sentence of subparagraph (c) and alleges that the charter involved herein is a contract or subcontract with a department named in the renegotiation act of 1942 as amended."

I would also like to state to the Court that we do not concur, of course, in Petitioner's statements as to
297 conclusions, and the application of certain statutes which he has stated in his opening statement.

Mr. Finn: We still don't know what department they claim or whether they claim it is a contract or a subcontract. I think we are entitled to know what their theory of the case is. Is it a contention that it is a contract, or a subcontract? If it is a contract with the Department, which Department? I think that is fair enough to request.

The Court: I think you are certainly entitled to know before the litigation is over, certainly.

Mr. Finn: The litigation is almost over in the sense that we are going to present all the facts by stipulation.

The Court: Are you going to identify the Department?

Mr. Curley: I have already identified it in my opening statement as the Maritime Commission.

Mr. Finn: Is it a contract or a subcontract?

Mr. Curley: I don't have to answer that one way or another. I am stating it is a contract or a subcontract. That is exactly how it was stated in the order of the Chairman, and I believe that I can plead or argue any alternative, either way.

Mr. Kline: I think it is probably the appropriate time, since counsel has made the opening argument to pre-
298 sent to the Court the stipulation which we have agreed upon, and the exhibits which are attached thereto, if your Honor will receive them at this time.

The Court: The stipulation and accompanying exhibits will be accepted.

Mr. Curley: I would like to make just one statement, your Honor.

I have not until just now signed the stipulation. We have agreed on it and I know that Mr. Finn would allow me to come in later on and correct any typographical errors that might appear. I have not seen it until today, because it was given to me just as your Honor saw them after ten o'clock this morning.

THE COURT: Counsel will have permission to make any corrections in the stipulation. The corrections, however, must be accompanied by not only his initials in the margin adjacent to any corrections, but also by the initials of Petitioner's counsel indicating that the corrections reflect the views of both parties.

MR. KLINE: May I say, your Honor, we just completed the typing and we worked a little bit late on the last exhibit. I think it is right, but like counsel for the Respondent, we feel there may be an error here and there. In substance it is all right, it is just a matter of form.

THE COURT: Very well.

299 MR. CURLEY: I would like to make one stipulation, which I believe is agreeable to them, that it is stipulated that the descriptive language as used in this stipulation to describe an instrument which it places in the stipulation as an exhibit, that such language is not intended by either party to be a construction of the exhibit so described.

MR. KLINE: That is correct, we are not trying to stipulate away the case by the stipulation of issues, if that is what you mean.

MR. CURLEY: I would also like to state that we are making a reservation which I believe is also agreeable to counsel for the Petitioner that in stating the issues in this proceeding, as we are submitting them in this stipulation, we have adopted the issues as pled in the prayers of the Petitioner, and we would like to have the Court and all parties realize that by making it in that form we are not deemed to waive any of the defenses which we may desire to offer in this proceeding and which have been placed in issue in this proceeding.

MR. KLINE: I thought that was what you asked before. I did not understand your previous question. The answer to that was "yes".

What did you ask?

MR. CURLEY: The first one, was that I wanted to stipulate that where we described anything in the stipulation,

300 let us say an exhibit upon which we put a descriptive language, I do not want to foreclose any party from arguing that that description is not conclusive on the Court.

MR. KLINE: That is correct, either in the statement of issues or statement of facts.

MR. CURLEY: That is correct. With those stipulations I stand.

There is one other reservation, Mr. Kline, that we made. I think it should appear on the record. That is, I believe it is Paragraphs 78 and 79. We have been under considera-

ble pressure to get this completed, your Honor, and it is rather lengthy, and we have no reason to doubt some of the dates involved in that. That is the date of September 17 at the bottom of page 18, and, well, that last sentence in paragraph 78 and also the last sentence in paragraph 79. Mr. Kline has agreed with us that we were to have the opportunity to verify their books at a subsequent date and make sure that that is a correct date because they themselves have only gotten it as telegrammed from the West Coast yesterday.

MR. KLINE: May it please the Court, we did not agree to an audit of the books. We did agree to a verification of the dates.

MR. CURLEY: That is right, I misstated it. It is to verify those two sentences, the last ones in paragraphs 78 and 79.

301 MR. KLINE: We did rely on telegraphic advice on that. The dates in those two sentences are to be verified. That does not include an agreement that our books may be audited.

MR. CURLEY: With those reservations I agree to the offering of the stipulation, your Honor.

MR. KLINE: The Petitioner is not going to call any witnesses, may it please the Court, we are going to rely upon the contract which is before the Court in stipulation and we think is sufficient to sustain our burden plus the finding of the Chairman of the Maritime Commission as to renegotiation and so forth, both of which are attached to the petition and which are included with the stipulations and Exhibits 1 and 2, I think, or rather, 1 and 3.

We also have included in the exhibits certain other documents which will tend to prove our issue, and with the submission of the exhibits as part of the stipulation the plaintiff will rest at this time.

THE COURT: May I see counsel at the bench?

(Side bar conference between Court and Counsel.)

MR. CURLEY: Your Honor, as I have stated to the Court, Respondent would like to present a few exhibits and oral testimony. While I feel that maybe the exhibit should go in first, we have a witness here from New York City who was brought up under subpoena, and we realize he is a

302 very busy man, and we would like to accommodate him first before the exhibits.

Mr. Collado?

Whereupon

EMILIO G. COLLADO

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

THE CLERK: State your name and address.

THE WITNESS: My name is Emilio G. Collado, and my address is 30 Rockefeller Plaza, New York.

By MR. CURLEY:

Q. By whom are you presently employed, Mr. Collado?

A. Standard Oil Company.

Q. Standard Oil Company of what?

A. Standard Oil Company. The New Jersey Company, but the title is Standard Oil Company.

Q. What is your position?

A. Assistant Treasurer.

Q. Would you state for the record, Mr. Collado, what your educational background is?

A. Well, I received a degree of Bachelor of Science at Massachusetts Institute of Technology in 1931 and a degree of Doctor of Philosophy at Harvard University in 1936.

303 Q. Mr. Collado, have you ever been employed by the United States Government?

A. Yes, sir.

Q. Would you state briefly for the Court what positions you have held for the United States Government?

A. In 1934 and until 1936 I was in the Treasury Department. I left the Government for the Federal Reserve Bank of New York and I returned to the Government in the Department of State in 1938 and I stayed in the Department of State until May of 1946 when I became the first United States Executive Director of the International Bank for Reconstruction and Development.

Q. Would you expand a little on the positions that you held and your duties with the Department of State in 1945?

A. In 1945, I was the Director of the Office of Financial and Development Policy, and later on I became Deputy on Financial Affairs to the Assistant Secretary of State for Economic Affairs, Mr. Will Clayton. During that period, I was appointed to a number of United States delegations and various international conferences and discussions.

Do you want me to go forward with those?

Q. I would like you to explain to the Court what positions you held as far as the operation of the settlement of the Lend Lease Act is concerned.

A. Well, the work that came within my jurisdiction
304 in this office in the Department of State, under the general jurisdiction of the Assistant Secretary of State for Economic Affairs, included the general financial affairs division, the Division of Investment and Economic Development, and the Division of Lend Lease policy.

Now, in the summer of 1945, in July, I was designated by the President to accompany the Secretary of State in company with the Assistant Secretary for Economic Affairs to the Potsdam Conference of heads of State, and subsequently I was designated as Financial Adviser to the American member of the UNRRA Council, that is, the United Nations Relief and Rehabilitation Administration. We met in London in August of that year. Mr. Clayton was also a member of the UNRRA Council.

While in London we, or Mr. Clayton, properly speaking, was charged and directed to prepare in consultation with British officials an agenda for general trade and financial discussions on matters of interest to the two governments, and while we were discussing that agenda, V-J Day took place, and subsequently the President ordered the termination of Lend Lease and certain procedures with respect to settlement of Lend Lease accounts. We consequently added this as an appropriate item to the whole agenda which included commercial policy and trade matters, finance and loans, and so forth.

Subsequent to that, the agenda was approved on both sides and the President designated the U. S. group
305 to deal with the British representatives in this whole range of questions. I was designated as the Secretary General of the United States Delegation for the whole negotiation. Mr. Clayton, Assistant Secretary of State, was also made a member of the subcommittees on the three main subjects: trade finance and loan; and the lend-lease; and to that was added disposal of surplus properties. As his deputy, I in fact acted also as deputy on the two committees that were within my area in the Department of State, to wit, Finance and Lend Lease Policy.

Q. Did you or did you not actually conduct any of the negotiations with the British representatives in that position you have described?

A. Yes, I did.

Q. With whom did you deal?

A. Well, I dealt with my opposite numbers, the Secretary General of the British Delegation, the British working members, and also directly with the senior British negotiators, and particularly Lord Keynes.

Q. In your dealings with Lord Keynes, were you negotiating the settlement of the Lend-Lease under the Lend-Lease Act?

A. That is correct.

Q. Now, in such dealings with the British that you have described, what was the first and fundamental aspect in the lend-lease settlement?

306 Mr. FINN: I object. It is immaterial what the first and fundamental aspect was. Let him describe what happened.

It makes no difference as to what the first and fundamental aspect was.

Mr. CURLEY: I see no objection. He seems to be qualified to state what the first problem was and what the fundamental principles were in the settlement of this lend lease operation which we would like to present.

The COURT: By "the first problem," you mean the first chronologically?

Mr. FINN: He means chronologically.

Mr. CURLEY: I mean the first and fundamental principle, let us say, in determining the settlement of the Lend Lease Act, under the Lend Lease Act.

Mr. FINN: It is not shown that this witness is the one who established the principles. After all, he was a lesser light in this over-all international policy, and I assume it was the President of the United States, if anybody, that established the principles, as to what might be the first and what might be the most fundamental.

The COURT: What is the object of the question, Mr. Curley?

Mr. CURLEY: I wanted to merely have the witness state as to what the two parties, that is, let's say, the two
307 Governments considered when they sat down and made the settlement under the Lend Lease Act.

The COURT: It is rather vague.

Mr. CURLEY: I will reword my question. I will withdraw the question and ask Mr. Collado this:

By Mr. CURLEY:

Q. What was the first and fundamental principle which the parties who were settling under the Lend Lease Act adopted for the Lend Lease settlement?

Mr. FINN: I object; it is immaterial.

Mr. CURLEY: I don't believe it is.

We have alleged, your Honor, in our amended answer, that the payments were made from funds appropriated by the Congress of the United States. In subparagraph (e) on page 7 of the Petition, the Petitioner has alleged:

> "Petitioner is informed and verily believes, and therefore alleges on information and belief, that the full amount of said freight paid to Petitioner by the Maritime Commission pursuant to the aforesaid intergovernmental arrangement, was drawn from funds appropriated by Congress for the use and benefit of the British Government, pursuant to and under the provisions of the so-called 'Lend Lease Agreement' between said Governments; and the United States was credited with the full amount of said payment in the
> 308 final adjustment and settlement of the Lend Lease accounts."

And I believe we are entitled to rebut that.

Mr. FINN: That is true, but not by one of the principles. The question is how was it physically and in a bookkeeping way settled, not what the principles were.

Mr. CURLEY: Before you get to the actual mechanics of it you have to establish what principles the two governments laid down to put these various transactions actually into operation.

The COURT: You may ask the witness questions as to what occurred. I am not entirely sure how relevant those occurrences are, but you may ask him for the facts as to what happened.

Mr. CURLEY: I will withdraw the question, your Honor.

By Mr. CURLEY:

Q. Mr. Collado, during the negotiations with the British, did the parties agree as to certain principles to be used in the settlement of the Lend Lease obligations?

Mr. FINN: The same objection. This witness is not competent to testify as to what the parties, the United States Government as a sovereignty and His Majesty's Government as a sovereignty agreed. He was merely following instructions. He could not know what they agreed.

The COURT: He can testify as to the events that occurred in his presence.

309 Mr. FINN: Of his own knowledge.

Mr. CURLEY: Isn't that what I asked him?

Mr. FINN: You asked him what the parties, the two governments, agreed to.

The COURT: You can ask him what the conference agreed upon.

Mr. CURLEY: I will withdraw the question.

By Mr. CURLEY:

Q. As a representative of the United States Government, during the Lend Lease negotiations with the British Government, what did the representatives of the various Governments agree to was the first and fundamental aspect of the Lend Lease settlement?

Mr. FINN: The same objection.

Mr. CURLEY: I think he is entitled to state it if there was one.

The COURT: Ask him that first.

By Mr. CURLEY:

Q. Was there between the various representatives, Mr. Collado, of the British and American Governments, the establishing of any principles upon which Lend Lease was to be settled?

A. Yes.

Q. What was the first and fundamental principle so established by the representatives?

310 Mr. FINN: I object until we find out who are the representatives that made it and how it was made and where it was made.

Mr. CURLEY: He has already stated the parties that were in negotiation, your Honor. If he wants to bring that out on cross-examination, that is perfectly all right.

Mr. FINN: I think we are wandering off into the realm of speculation.

Mr. CURLEY: There is no speculation if he can state as a fact. He said he knows there were principles. I think he is qualified to state as a fact what they were.

Mr. FINN: Undoubtedly, but not which was the first and foremost and which was fundamental.

The COURT: Was there a principle which was regarded by all of the negotiators as a first and fundamental principle?

The Witness: Yes, sir.

The Court: And that is based not on your subjective judgment but upon your observation of the discussions that you had with the representatives?

The Witness: Yes, sir.

The Court: Representatives of the British Government?

The Witness: Yes.

Mr. Curley: Did you answer that, Mr. Collado?

311 The Witness: Yes, sir.

The Court: You may answer the question.

Mr. Curley: Would you read back the last question for the witness, please?

(The pending question was read by the reporter as follows:

"Question: What was the first and fundamental principle so established by the representatives?")

The Witness: The principle established by the representatives as a basis for the settlement, principal basis for it—there were other principles and other bases as well—was that there should be no monetary settlement, there should be no account taken into monetary settlement either of direct lend lease or reverse lend lease on account of goods or services consumed, lost, or destroyed.

The Court: Would you explain that, please?

The Witness: Yes, sir.

The discussions, as I said before, took place in the fall of 1945 after V-J Day. Lend Lease had been proceeding since 1941 when the Act was established.

Under the Lend Lease Act, the United States Departments, the President and Departments under his guidance, were authorized to transfer to various foreign countries for the defense of the United States goods and services of a great variety and nature. The account ran into very,

312 very many billions of dollars.

The principle established in this negotiation with the British, which was the first of the Lend Lease settlements, was that there should be no financial compensation, payment, or other monetary settlement on account of those items which had been consumed, lost, or destroyed, and that the only items taken into the final calculation on the basis of which a monetary settlement was arrived at were items of civilian end use character physically in existence either in the pipeline or already transferred to the British government, and not destined, not transferred to the British Military.

Now, there were certain reservations which had been spelled out in the undertakings, and in particular there were certain recapture provisions, such as military recapture, but in the financial resettlement only those items were taken into it.

THE COURT: In what form was this so-called first and fundamental principle reflected? Was it in the form of a document signed by the representatives of the Government of the United States and the British government or was it merely an oral understanding?

THE WITNESS: It was the basis on which documents which were signed by the representatives were drawn up. And the fact that it was a basis was expressed by the lend-lease administrator in his report subsequent to the signing
313 of these agreements.

By MR. CURLEY:

Q. Would you, Mr. Collado, give me an example or two of what the representatives considered were goods and services lost, destroyed or consumed?

A. Well, the goods transferred covered a great variety of items: military equipment, materiel, food, clothing; and in the civilian end use categories, machine tools, tractors, food again, clothing and raw materials such as iron and steel, copper, and so on.

Items which were consumed, lost, or destroyed obviously included things that were shot away in the waging of the war, food that was eaten, and materials that no longer physically existed.

In addition, there were a number of service categories. There were technical services, there were rights under patents, and things of that sort, and probably the largest in terms of the monetary aspect of it was transportation services on land, sea, and air.

An item that was consumed was one that was used up before the date of the settlement and what wasn't consumed was what was physically on earth at the time of the settlement.

Q. Were the settlements which were participated in by the representatives of the United States considered by those representatives as a full and complete settlement of lend lease?

314 MR. FINN: I think that is immaterial. After all, Congress set up the Lend Lease Act and the administration and everything else. What this group thought is immaterial. I don't care particularly what the answer

to his question is, but it is the line in which it is apparently starting off.

THE COURT: I think the question is objectionable. It is not material what these people thought.

By MR. CURLEY:

Q. Was the settlement which you have described full and complete settlement of all Lend Lease obligations?

MR. FINN: That is the same thing, that is a conclusion. Let the agreement speak for themselves.

THE COURT: I think that is objectionable.

MR. CURLEY: That is all.

You may cross-examine.

CROSS EXAMINATION

By MR. FINN:

Q. Mr. Collado, did the Petitioner in this case, California Eastern Line have anything to do with this so-called settlement?

A. Not to my knowledge.

Q. Was the Petitioner consulted about any of the terms and conditions or principles involved?

A. Not to my knowledge.

Q. You would know about it, would you not?

315 A. No, sir; not necessarily.

Q. You would think it very strange, though, if they had been consulted?

A. I would not like to express a view on that.

Q. Now, you mentioned that the transportation service was one of the largest monetary items involved. How do you determine that?

A. I stated it was one of the largest items of the service category.

Q. How could you determine it was large or small?

A. Because statistics were prepared on the actual expenditures by budgetary expenditure categories.

Q. Where was that prepared? In Washington here, you mean?

A. Certainly.

Q. As the money was spent and services were given?

A. The Lend Lease Administrator, under the Act, was required, and in fact did render a quarterly report. And in the Lend Lease Administrator's report he brought together statistics of the expenditures by the various Government Departments which were authorized under the Lend Lease Act to spend certain funds for Lend-Lease purposes,

and those were collected and published in the report we made to the Congress.

Q. Were they allocated between the various countries receiving Lend Lease aid?

316 A. Yes.

Q. Were those statistics so set up as to show how much each nation was receiving in Lend Lease aid?

A. Yes, they were.

Q. Now, as services were rendered or supplies were furnished, was the cost of such service or supplies charged to the particular country who was receiving the benefit of it?

A. Well, the administration of the Act, the handling of the funds was not a function of the Department of State. I did not participate in those actual expenditures. I have seen the Lend Lease Administrator's Report. I participated in the settlement of the accounts, and not in the mechanics by which the transfers were carried out and the funds expended.

It was my understanding that data that I have referred to are the accumulated totals of actual expenditures made by the proper fiscal authorities of the United States Government pursuant to legislation and tabulated from time to time. As I understand it, they represent expenditures by the various Government departments charged against the Lend Lease Act. They are shown in terms of the countries to which the goods were transferred, but I repeat, this was not a function of the Department of State, and so I was not concerned with the mechanics at all.

Q. When you went into these conferences, you had supplied to you a statement showing the total amount

317 of lend lease given to the British, did you not?

A. Yes.

Q. And you had a statement showing the reverse lend lease from the British to the United States, did you not?

A. Yes; in fact, there was a total, but there was mostly the detailed categories rather than——

Q. And it was broken down into various classifications?

A. That is right.

Q. So as the representative of the United States in these negotiations, as one of the representatives, you went into that conference knowing how much lend lease aid had been rendered to Great Britain, did you not?

A. Certainly, in general terms at least.

Q. Let us assume, taking round figures, that that was $50 billion. Or maybe you know the exact figure. Do you know?

A. It was $29 billion, roughly.

Q. It was $29 billion worth of lend lease that we had supplied to the British?

A. Yes.

Q. Now, do you know the approximate figure of the reverse lend lease?

A. I haven't looked at it for five years, but on the order of four or five billion dollars, I would say.

Q. That showed a balance in favor of the United States, did it not?

318 A. Well——

Q. About $24 billion?

A. Well, it was never struck, to my knowledge. Lend lease went one way and reverse went the other, and they were two separate things, and there was no compensating that I know of in terms of that. Obviously, some people may have made the subtraction in their mind.

Q. Were you familiar with the provisions of the Lend Lease Act itself as to the terms and provisions of settlement of Lend Lease?

A. I was, yes.

Q. And did you not go into that conference knowing full well that you had to get some consideration out of the British for what had been provided by Lend Lease?

A. (No response)

Q. Lend Lease was not intended as a gift, was it, in the first instance?

A. Well, I didn't participate in the work of having the Lend Lease Act presented and put through the Congress. I don't think I am in a position to say what the intention of the Congress was.

Q. To go back to your conferences, then, were you told and instructed to go over there and give away the money?

MR. CURLEY: I object to the way the question is worded. I think he should restrict himself to the direct

319 testimony.

By MR. FINN:

Q. What were your instructions in so far as collecting, waiving, or cancelling this $29 billion account?

A. We were, first of all, bound by the terms of the master lend lease agreement negotiated, I believe, in 1942 that was signed between the two governments, Article 7 of which stated—I think it was Article 7, but I haven't looked at it for many years, so maybe I had better not say definitely it was Article 7—that the terms of the settlement, the ultimate terms of settlement would be agreed in the future.

When this was signed there was no intention of making any financial arrangements for settlement at the time Lend Lease was being provided, but I was saying that the eventual settlement should be such as not to be unduly burdensome on trade, on international trade between the countries.

That certainly was an over-all guidepost that the people settling had to look at that had been agreed upon between the governments three or four years earlier.

In addition, the President, in his executive order in respect of Lend Lease, which was dated in August and somewhat amended before the full agreements were settled, had indicated in very general terms that he wished the settlement to provide for terms in accordance with the
320 general legislation, and in particular he mentioned settlement for the so-called pipeline of goods and services contracted for and under way not all formally delivered at the other end.

We had those general guideposts. I would say that the negotiation committee appointed by the President, in general, and their advisers, of which I was one, had the job of advising and recommending to the President what would be the terms of settlement which he should approve and which would be under the terms of the legislation and other provisions of the Congress. I think that was the function of the Negotiating group.

Q. Then, as I get it, you people did not actually settle it; you merely negotiated and made a recommendation to the President?

A. The President had to approve the final settlement before it could be adopted on behalf of the United States.

The Court: Was the settlement embodied in a single document or in a series of documents?

The Witness: The general settlement was embodied in one document, a rather short document, which was signed at the same time that the financial agreement and other agreements of that same nature were signed. That was in December of 1945. Those agreements were signed by the appropriate representatives of the United States, in each case Cabinet officers, depending on the subject
321 matter of the agreement after they had been submitted to the President of the United States by the Committee that he had appointed in the previous September. And he had approved going ahead and signing these documents with the British representatives. They, presumably, were similarly authorized by their Government to sign.

THE COURT: Then, do I understand that the agreement or agreements were negotiated by the respective delegations of the two countries and then submitted to the President for approval?

THE WITNESS: Yes.

THE COURT: And upon approval transmitted to an appropriate Cabinet officer for execution?

THE WITNESS: Yes.

The Secretary of the Treasury who signed the financial agreement was a member of the Committee, so there is no question of transmitting it to him.

In the case of the State Department, the Secretary of State was a member of the Committee, but his own deputy, the Assistant Secretary of State, Mr. Clayton, in fact, conducted the negotiation and it was the Secretary of State in person who took them to the President for approval and received that approval.

THE COURT: And was there an agreement which comprehended the settlement of accounts with respect to transportation services?

322 THE WITNESS: Yes, sir.

Now, I should add one thing——

The COURT: And what was the substance of that agreement?

The WITNESS: The substance of the agreement—it was part of the over-all, the transportation services as well as any other services were merely lumped in the general category of goods and services, and there was an over-all settlement, as I stated earlier, which took in monetary arrangements in fixed amount in terms of interest and authorization, and so forth, for only those categories which reflected goods physically in existence at the time of settlement.

The COURT: Let me interrupt you.

What you have previously stated was with reference to a principle that was, as counsel for Respondent put it, I think, the first and fundamental principle that was employed in the negotiations.

I am now directing my attention not to the principle that was employed in negotiations, but I am directing my attention to the operative documents that were ultimately executed in connection with the negotiations.

Did they, in fact, cancel the accounts in relation to transportation furnished by the respective countries?

The WITNESS: If by the word "cancelling" you mean did they settle the accounts, yes, they did.

323 The COURT: In other words, Great Britain was relieved of its obligation to repay the United States with respect to transportation which the United States furnished to Great Britain, and vice versa, if any?

The WITNESS: Yes. There were no further items outstanding for settlement after this particular settlement had been agreed to.

The COURT: I may remark parenthetically, for the benefit of both counsel, that I cannot tell at this point what relevancy, if any, any of this has, and that will have to be determined upon a decision of the case.

You may proceed.

The WITNESS: I wonder if I might say one thing that I think is responsive to one of your questions, which is that there was a general memorandum of understanding in December at an agreement that a number of, should we say, more technical details would be worked out by technical parties, and brought to a final text, and that text in fact was worked up in the succeeding months and signed, I believe, in March, 1946.

I did not want to imply there was no further piece of paper after December, because there was in 1946 which wound the thing up.

By Mr. FINN:

Q. Is it a fact, Mr. Collado, that in one of those agreements that was signed, the two Governments ex-

324 pressly waived the claims?

Mr. CURLEY: I think——

By Mr. FINN:

Q. And I mean used the word "waived".

Mr. CURLEY: If counsel for the Petitioner has something in mind and is reading from a document, I think he should give the benefit of that document to the witness so he can see exactly, and there will be no misunderstanding as to what is involved here.

Mr. FINN: I have no objection to showing the document. It is a simple question.

What did they waive?

The COURT: I will let the question stand.

The WITNESS: I cannot recall the text of the document,

if that is what you are asking me. I have not looked at the document since 1945 or early 1946.

By Mr. FINN:

Q. My point is, you had an account against the British for $29 billion. What happened to that account? Is it still up in the air now or is it waived?

A. I stated that this settlement that was made, according to the principle that we discussed earlier, was regarded as in full settlement of all the outstanding lend-lease and reverse lend-lease.

Q. They did not collect on it, did they?

325 A. Do you mean to say in monetary terms?

Q. In monetary terms, if you will.

A. They collected a settlement that in the opinion of the Negotiating Committee, and presumably of the President of the United States, as he approved it, was an adequate and appropriate settlement under the terms of the legislation.

Q. Would all the terms of the settlement be set forth in the twenty-second report to Congress of Lend-Lease operations? Are you familiar with that document?

A. I haven't looked at it—again, it was five years, I would have to be sure.

Q. Have you looked at a part of it in the last five years?

A. I have not looked at any one of these pieces of paper since I left the Government. I have had no occasion to and I haven't looked it over.

(Document handed to the witness.)

You see, this was prepared by people other than myself, this report, and I was not a party to its preparation. As I examine it for the first time in a long time, the appendices you refer to, they appear to be all the agreements and settlements that were made as specifically stated therein. The agreement that I have been discussing that I am most familiar with is this first one here dated December 6th.

Q. You helped prepare the various supplementary

326 agreements and appendices?

A. They were prepared by the group of committees, and by the time they were finally signed, although I was generally familiar with their preparation and had some connection with it at the beginning, I had been appointed the U. S. Executive Director of the International Bank and although I was still technically in the State Department, we had an International Monetary Conference

in Savannah, simultaneously with the issuance of this document, and I was in Savannah and not in Washington when they concluded the final document. I have not the same close acquaintance with that that I had with the earlier one of December, which was the basic one.

Q. Were you familiar with the terms of the agreement on settlement of intergovernmental claims, which is the title of this?

A. I was familiar with the general principles of it. I did not work on the detail of it. It was brought to me to pass on in the very broadest principle, and it was worked out between subparties on the side that were designated for the purpose.

Q. You really, of your own knowledge, don't know whether they were waived or paid or collected or charged, do you, on any individual item or group of items?

A. Yes, I do, because I know what was taken into the settlement. What wasn't taken into the settlement
327 was settled without financial claim and so stated.

Q. Certain transportation costs were taken into the settlement, weren't they?

A. Those that went into the pipeline after a certain date. They are in the same category with the physical goods physically in existence. The dates are specified in the agreement, as I recall.

Q. Take, for example, an item of freight, insurance and handling charges of South American meat to the Soviet Russia and United States government accounts. Did you have that before you?

A. You are talking about the Soviet meat; I am afraid that hasn't got to do with the British lend-lease.

Q. I am reading from the British lend-lease settlement and it mentions in there——

A. Soviet meat?

Q. Argentine meat, Argentine meat to the Soviet.

Now, there was another item in here I notice for re-export of 10,000 tons of lend-lease steel to France. Isn't that transportation?

A. Well, I assume it was transported. I don't know if that item is for transportation. I don't know whether it was for the steel.

Q. Transportation costs for petroleum to Sudan.

What I am trying to find out is: Did you personally
328 have anything to do with the settlement of those various items?

A. Yes. I can explain what I had to do with those.

Q. Did you have anything to do with those particular types of claims?

A. I had to do with the settlement of those items, and not with those particular items, I could explain that if you would like me to.

Q. Did you make an agreement:

> "that all financial claims whatsoever of one government against the other, which arose out of lend lease or reciprocal aid or (b) otherwise arose on or after September 3, 1939 and prior to September 2, 1945, out of or incidental to the conduct of World War II, and which are not otherwise dealt with in the agreements concluded this day . . ."

referring to the date of the supplementary agreements——

> "are hereby waived and neither government will hereafter raise or pursue any such claims against the other."

Did you make that agreement with your counterparts on the British side?

A. I was familiar with the fact that this agreement was made. I transmitted in my capacity in the State Department the recommendations of the people who worked it out with their British counterparts to the top United States authority with the recommendation that it be signed.

329 I explained to you earlier this series of papers, not the agreement you have just read, but this other set of numbers that you showed me were some areas on which adequate data were not available prior to December 6 for final determination and they were specifically reserved for subsequent determination, and this working group, if I may call it that, that worked on with this matter and produced the detailed agreements in March took those up.

You may recall that the financial settlement, in itself, had a flexible clause that after certain items had been further considered and data further examined the exact amount of the financial settlement could be altered upward or downward in accordance with some very narrowly defined principles.

I was very familiar with the basic settlement and knew there were these categories of items that remained to be taken into consideration. I knew people competent in those figures were working on that and they made their recommendations. The whole number of people involved in this at one stage or another probably ran into the hundreds.

I was not familiar with each detail that each of these persons worked on.

Q. Did this particular agreement go through or over your desk?

A. Yes.

Q. Did you recommend approval of it?

330 A. Yes.

Q. Did you read it before you recommended it?

A. Yes. I never recommended anything in my life that I didn't read.

Q. Looking at it again, Clause 6 of this Agreement on Settlement of Intergovernmental claims, is it not a fact that the parties agreed to waive the claims?

A. They agreed to wash them out.

THE COURT: The document will speak for itself.

THE WITNESS: The document says: "They are hereby waived." All I can say is you have refreshed my memory by showing me.

By MR. FINN:

Q. And now you recall they were waived?

A. That is what it says.

Q. Do you recall having agreed that they be waived?

A. That is what it says.

Q. Do you recall having agreed that they be waived?

A. It says here that all these claims defined which are not otherwise dealt with in the agreements concluded, which were the financial settlement that I was referring to earlier, are hereby waived and neither government will hereafter raise or pursue any such claims.

Q. That was the agreement you made with the British government?

331 A. Yes, signed by the Secretary of State as Acting Lend Lease Administrator.

MR. FINN: That is all.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: On the record.

MR. CURLEY: I have no further questions, your Honor.

THE COURT: We will take a ten minute recess.

MR. CURLEY: Before we go off the record, I would like to request that the witness be excused from further attendance in court.

THE COURT: You may be excused.

(Witness excused.)

(A short recess was taken.)

MR. CURLEY: If your Honor please, I would like to offer as Respondent's Exhibit A, a letter from Conway, who is identified in the stipulations submitted as the District Manager of the North Atlantic District, United States Maritime Commission to Mr. Nicol, who was also identified as the agent or officer, or representative of the Petitioner, the letter dated October 15, 1941. This letter advised the ship owner who is the Petitioner in this case, as to the methods that they are to employ in claiming demurrage under the terms of the contract.

332 MR. FINN: May I see it, please?

I object to that exhibit, your Honor. It is obviously immaterial and irrelevant what Conway said to Nicol about future sailings of other vessels in October 1941 when our ship had already completed her contract and delivered her cargo at the port of destination and was then long since on her own affairs.

THE COURT: Who is Mr. Nicol?

MR. FINN: He is in this case agent for State Steamship Company. He is a ship broker in New York. He was the agent for Petitioner as to the VERMONT but this letter pertains to another vessel on another voyage, not the Petitioner's.

MR. CURLEY: That is not necessarily so, your Honor. The correspondence and the exhibits which have been attached to the stipulation will show that the Maritime addressed letters to Nicol in care of State Steamship Company. It seems all through these negotiations they were using the term "State Steamship" rather than the actual name of the petitioner, which is California Eastern Line.

Mr. Finn will, I think, state for the record that he, Mr. Nicol, represented State Steamship, California Eastern, Pacific-Atlantic, and other companies.

THE COURT: I don't know what relevancy, if any, this document has. It may have none and it might have

333 just a slight amount. I am not prepared at this time upon this hasty reading of it, and not having read the stipulation of facts in order to be able to tell just where it stands in relation to the case.

I will admit it for whatever value it may have, if any.

THE CLERK: Exhibit A.

(The document referred to was marked Respondent's Exhibit A, and received in evidence.)

MR. FINN: Exception.

MR. CURLEY: I would like to offer Respondent's Exhibit B,

a letter from the same Conway to the State Steamship, attention R. A. Nicol, dated July 9, 1941, which instructs the Petitioner that the invoices should be submitted to the Maritime Commission rather than to the British Ministry of War Transport.

THE COURT: Is that a letter or is that a photostatic copy?

MR. CURLEY: I believe we have agreed on all of these photostats that I am going to offer that there is no question that they are true copies of documents and that they are correct.

THE COURT: Is this a photostat of the letter itself or a photostat of a retained copy of the letter?

MR. CURLEY: This one is a photostat of a letter
334 itself which was actualiy received by the Petitioner.

MR. FINN: There is no question as to its authenticity.

I make the same objection. It is immaterial and irrelevant.

The charter contract speaks for itself and this has nothing to do with the issue as to whether the contract is with the British Ministry or with a Department of the Government.

MR. CURLEY: Your Honor, the invoices were in fact submitted to the Maritime Commission. The name appears on the public voucher which is part of the stipulated material.

THE COURT: I doubt that this has any relevancy to this case whatever. It is addressed to the State Steamship Company and not to the Petitioner. It is true it is for the attention of Mr. R. A. Nicol. That is extremely thin to tie into this case.

MR. FINN: We do not base our objection on the fact that it is addressed to the State Steamship Company, because it is true that on frequent occasions the Maritime Commission mixed up the names. It was intended for Nicol, and we will accept it as such. But we don't see that it is relevant to how or what Mr. Conway thought the form of the invoices should be.

Now, as a matter of fact, and to correct Mr. Curley,
335 the three invoices in this case, as will be shown by the exhibits were all made out, each and every one of them, to the British Ministry of War Transport, not to the Maritime Commission. They were transmitted to the British Ministry and they were approved by the British Ministry, and then they were sent with a public voucher to the Maritime Commissi'n. The public voucher is made out to the Maritime but it had to be in order to get the payment under the Intergovernmental arrangement.

MR. CURLEY: There was no question but that the voucher was made out to the Maritime Commission.

MR. FINN: But you said invoices.

MR. CURLEY: These I refer to as invoices are in the record already. They are exhibits 66, 68, and 69.

THE COURT: Again, as I remarked before with respect to Exhibit A, I have grave doubt whether this document has any place in the record, and I am not excluding it at this point, however. I will admit it for whatever value if any that it may have.

THE CLERK: Respondent's Exhibit B.

(The document referred to was marked Respondent's Exhibit B, and received in evidence.)

MR. CURLEY: I would like to offer, your Honor, as Respondent's Exhibit C, a letter from the same Conway to R. A. Nicol, dated August 22, 1941, which refers to methods of presenting various documents that the Petitioner
336 should submit on payment.

MR. FINN: The same objection. Bear in mind there, too, that the freight was paid in June and this letter talks about payments of freight in the future.

We had already been paid our freight on this one.

THE COURT: I will admit it with the same understanding.

THE CLERK: Exhibit C.

(The document referred to was marked Respondent's Exhibit C, and received in evidence.)

MR. CURLEY: I would like to offer as Respondent's Exhibit D, a renegotiation agreement dated December 21, 1948, between the Petitioner and the Respondent for the fiscal period ended March 15, 1942. The caption of it is: "Contract No. Mc 61525PABs1318."

The purpose of this offer, your Honor, is that as the stipulation will show the Petitioner's fiscal period was broken in 1942 for the reason that it changed the state of incorporation. The parties entered into a renegotiation agreement and in this agreement they specifically exclude the contract which is involved in this proceeding.

And I am offering this in support of our position that the contract was not completed or terminated until the year 1942, which was the fiscal year in which this agree-

ment was entered into, and also that they specifically exclude it.

337 MR. FINN: I think the very fact that it is excluded makes it immaterial and irrelevant to the issue here. We have the point that payments were made in 1942, that is not denied. There is no question about that.

MR. CURLEY: It is not denied, but the question before the Court is: was the contract completed in 1942? Now, the parties for the fiscal year 1942 specifically kept this out.

THE COURT: They may have excluded it for other reasons.

MR. CURLEY: That is for us to argue. It says on there they were excluded in this agreement.

THE COURT: Won't counsel for the Petitioner stipulate with you that it was excluded?

MR. FINN: There is no question about it, your Honor.

THE COURT: If counsel will so stipulate I will sustain the objection.

MR. CURLEY: That is satisfactory to me. I will withdraw that exhibit.

I would like to offer as Respondent's Exhibit D, a photostatic copy of a letter written by G. H. Helmbold, Director of Operations and Traffic, United States Maritime Commission, to the State Steamship Company, dated August 29, 1941. The letter sets forth a change in the rates of

338 Red Sea charters and it is offered to explain and to illustrate and also to support our position as to counteract some of the evidence which is in the stipulation, namely, some of the statements made by some of the parties which are in the letters which are in the latter part of the stipulation offered.

MR. FINN: Does counsel suggest to the Court that this is changing the rates of the charter involved in this proceeding?

MR. CURLEY: No, sir.

MR. FINN: Then it is entirely immaterial.

MR. CURLEY: If your Honor will look at the stipulation, from Exhibit 73 on, there are several letters which the Petitioner wanted in the record, and in which these changes in rates are referred to, and particularly, I believe, the one, No. 76, spells out the rates, and I think it is important to the case here that we know who actually made the change in rates and how they were promulgated.

THE COURT: Is there any question about that?

MR. CURLEY: There is a question as to how they were promulgated, and this is the method by which they were

promulgated. The Maritime Commission actually issued the instructions on the change of rates.

MR. FINN: These changes in rates, in the first place, were adopted by the Commission pursuant to statutes that
339 intervened, your Honor, that controlled regulations, and admittedly these rates have nothing to do with our charter or our agreement.

This letter is dated August 29, and we delivered the cargo on August 8 and we had been paid the freight. There is no claim of a refund of freight by reason of this letter.

THE COURT: Is there any question as to the method of changing rates, if such rate should be changed?

MR. FINN: Are you talking about our contract?

THE COURT: Yes.

MR. FINN: There was no power to change the rates, and this doesn't change them. It is not offered for that purpose. They are talking about future voyages of other contracts.

MR. CURLEY: This is offered, your Honor, to show the Maritime Commission, who was a principal party as far as the Government is concerned, the principal party in interest in this contract, had the power to change the rates on the Red Sea cases. That is, the fact that the rates were changed——

THE COURT: Let us not talk about the Red Sea cases, let us talk about this case.

Mr. CURLEY: Petitioner has insisted upon putting into evidence certain documents which are involved in the whole Red Sea operation. They are attached to the stipulation.

MR. FINN: No, your Honor. We have not insisted
340 on any documents on the whole operation.

MR. CURLEY: What are the letters you have insisted on?

MR. FINN: Rebuttal to what you wanted, and we concede for the purpose of the facts that our insistence was on the first eight or ten facts and you wanted all the rest.

MR. CURLEY: These collateral letters you are putting in spell out the operation on an over-all picture. We are trying to show your Honor by this letter that the Maritime Commission not only for the contract involved herein but for all contracts was actually the principal party in interest.

MR. FINN: Changing the rates by authority of Congress as to the general control of shipping does not make them a party to this contract.

MR. CURLEY: That is a matter for brief, as to where the authority was.

I want to show they were exercising their authority to change the rates.

MR. FINN: They changed the rates, and if you wanted to sign a contract for the future, these are the rates they were going to offer you. That doesn't change any rates.

Your Honor, that is just the sort of thing we have been up against. They want to bring in the whole kitchen sink and want to go still further. Undoubtedly, your
341 Honor, there are hundreds and thousands of documents pertaining to what was going on in 1941 and 1942, both pertaining to this operation and to all the other shipping operations.

Now, when the Government picks out certain things and offers them in evidence, we could just clutter up this record and go on until doomsday.

THE COURT: Did these changes in rates referred to in this proposed exhibit rest upon intervening legislation?

MR. CURLEY: According to our philosophy of the case, no, your Honor.

MR. FINN: They did, your Honor.

THE COURT: Was there intervening legislation?

MR. FINN: There was the so-called ship warrants Act which gave the Maritime Commission a vise hold on American shipping and international shipping because without a warrant you had to agree to do as they said and be a good boy.

MR. CURLEY: When was that passed?

MR. FINN: That was passed in July and effective in September.

MR. CURLEY: Effective in December.

MR. FINN: I think you are mistaken on that.

THE COURT: I think this letter is getting a bit too remote. I will sustain the objection.

MR. CURLEY: May I suggest that you hold that and let me argue that in the brief, then?

342 MR. FINN: No.

MR. CURLEY: I have several letters by which it is incumbent upon the Government to show that there is either a subcontract or agency relationship involved in this case.

THE COURT: I think that is fair enough.

My impression is that at the moment this should be excluded. However, I will withdraw my ruling sustaining the

objection and reserve judgment on it if counsel wishes to argue the point.

THE CLERK: Respondent's Exhibit D for identification only.

(The document referred to was marked Respondent's Exhibit D for identification.)

MR. CURLEY: I would like to offer as Respondent's Exhibit E a letter from G. A. Helmbold, whom I previously described, to Mr. John S. Maclay, British Merchant Shipping Mission, dated August 29, 1941, and this letter advises the British Merchant Shipping Mission, your Honor, of the change of rates made by the Maritime Commission in the Red Sea operations.

MR. FINN: The same objection, it is too far away.

THE COURT: I will reserve judgment.

THE CLERK: That is marked for identification as Exhibit E.

343 (The document referred to was marked Respondent's Exhibit E for identification.)

MR. CURLEY: I would like to offer as Respondent's Exhibit F a letter from G. H. Helmbold, whom I previously identified, to Mr. John S. Maclay, also previously identified, dated September 12, 1941, and this letter supplements the letter which I previously offered to the Court, the last exhibit.

THE COURT: I will similarly reserve judgment on this one.

THE CLERK: Exhibit F for identification.

(The document referred to was marked Respondent's Exhibit F for identification.)

MR. CURLEY: I would like to offer as Respondent's Exhibit G, a statement by His Majesty's Government, as to the circumstances under which certain American vessels were made available for carriage of war supplies to the Red Sea area in 1941. This statement is certified to——

MR. FINN: Before we go further, I hate to interrupt——

MR. CURLEY: May I make the offer?

MR. FINN: This document, in the first place, is not being described in the proper manner. We battled this out before and it is no surprise. I have a copy of the document and

there is not an objection in the book that could not be cited against this document.

344 I object to the description. He is not at all truthful when he says it is a statement of the British Government.

MR. CURLEY: I am entitled to read it as it appears in the record I am holding in front of me.

MR. FINN: It is not in the record.

MR. CURLEY: I am reading from a statement I have before me.

I am offering as Respondent's Exhibit G, a statement by His Majesty's Government——

MR. FINN: I think it is a document.

MR. CURLEY: ——as to the circumstances under which certain American vessels were made available for the carriage of war supplies to the Red Sea area in 1941.

That is the title of the document. The document is certified to, and I will read the certification:

> "I, Frederick Victor Cross, an Assistant Secretary of the Ministries of Transport, hereby certify that the document hereto attached and marked A"——

which is the document I have just read the title of——

> "is a statement based on information extracted from documents preserved in the archives of the Ministry of Transport (formerly the Ministry of War Transport) and that to the best of my knowledge and belief it is a true statement."

That is signed by F. V. Cross and dated 18 January
345 1941, the Ministry of Transport, Barkley Square House, London.

Underneath that appears the following statement:

> "I, Henry Frank Hancock"——

MR. FINN: Your Honor, in so far as I know——

THE COURT: The document will speak for itself.

MR. CURLEY: I want to identify it.

THE COURT: You have identified it sufficiently.

If you will let me have it, and if counsel will indicate first what you wish to prove with it, then I will listen to whatever comments Petitioner has with respect to it.

MR. CURLEY: Your Honor, it appears several times in our amended answer, but the first time it appears is in subparagraph (b), or paragraph 5:

"Respondent further admits such allegations contained in subparagraph (b) as are borne out by Exhibit B, except Respondent denies that Exhibit B was executed on May 29, 1941 and alleges that this charter is a contract or a subcontract with a department named in the Renegotiation Act of 1942 as amended, and further alleges that in signing said charter the British Ministry of War Transport was acting for and on behalf of a department named in the Renegotiation Act of 1942 as amended."

In addition, we would like to show by this document actually when, or at least the earliest date by which the British signed any contract, including the Petitioner's contract involved herein.

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The document also attaches a list of vessels which include the vessels involved in this contract and in this case. It states in here just exactly what the conditions were under which the British signed this charter for the Maritime Commission. I think the document, when your Honor reads it, will speak for itself in support of our case which we have alleged.

MR. FINN: Go ahead and read it, your Honor.

THE COURT: I will hear you, Mr. Finn.

MR. FINN: I think, your Honor, on its face the document is incompetent and I think your Honor will see that for himself. It is not, in the first instance, as it might appear to be, a duly certified copy of a public document from the records of the British government, and does not come under that rule.

Secondly, it is an unsigned statement to which is attached a signed certification which is vague and meaningless. The man who prepared the statement is not identified. The statement itself is unsigned and the author is unknown. The author is not here for cross-examination. Mr. Cross, in his certification, says that the document attached is a statement, by whom he doesn't say, based on information extracted from documents, and he doesn't say how much or how little is extracted nor does he say what documents, how many or how little of the documents were extracted and used, and which documents are preserved in the archives of the British Ministry. And to the best of his knowledge and belief, it is a true statement.

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It is not shown that Mr. Cross is at all qualified or competent to decide what documents he should look at and what the conclusions are of the documents.

The petitioner, of course, has not had the opportunity or never will have the opportunity to examine those documents in the archives of the British Government. We can not even examine the documents in the Archives of our own Government here. Certainly it is not the best evidence of what the intentions of the British Ministry representatives were at the time.

And, incidentally, I call your Honor's attention to the fact that this certificate, presumably the statement attached to it, is dated January 18, 1951, ten years after the event. It is an attempt to impeach some statements or letters or signatures of the British Ministry represented on this side. Look at the charter, that is not signed by him as an agent, and yet this man who had nothing to do with it purports to now say what was in the minds of those people when they acted. He furthermore says something about it was understood that certain things—understood by whom?

THE COURT: I will sustain the objection.

348 MR. CURLEY: Your Honor, may I suggest that we be permitted to have this marked in the record and that we brief it? I am prepared to argue this legally and I think that there is ample justification for the admissibility of this document. I have half a dozen cases which will support my position on this.

The statement of Petitioner, I think, is subject to quite a bit of rebuttal evidence, and I would like to, at this time, either argue it now or argue it in my brief. I have not been permitted to argue it except merely making a statement of offering it. I have every authority, I believe, which will support the Government's position on the admissibility of this document.

THE COURT: It is my present judgment that the document is not admissible. However, I think it is only fair to permit counsel to make such legal arguments as he wishes to present to the Court, and I will, for that reason, again in this situation withdraw my ruling sustaining the objection, and I will let counsel make such arguments as he desires. However, I will let counsel know that it is my impression that this document is not admissible.

MR. CURLEY: I would like to have that permission to argue it in my brief, because as I said I have not had a chance to argue it. I would like to present to the Court fully and completely which could go in a brief a complete statement of our position as to the admissibility of

349 this document.

THE COURT: This, as counsel for Petitioner stated, is an unsigned document. It is not, apparently an opera-

tive document itself, but is a synthesis by some one purportedly made from other documents in the archives or files of the British Government.

Mr. CURLEY: Your Honor, may I just——

The COURT: It is not necessary for you to argue the point. I have withdrawn my ruling and I will permit you to argue it.

Mr. FINN: Your Honor, I would like to take strong——

The COURT: I don't know the cases that counsel for Respondent wishes to present.

Mr. FINN: All he wants, your Honor, is to get that into the record, and I think it is most inadmissible. I want to restrain myself, but it is especially tailored for this case.

The COURT: This is not a jury case.

Mr. FINN: I know, but it is the principle of the thing more than anything else. This document was prepared for use in this case. We don't know who prepared it, but surprisingly it follows after the amended answer he has put in. It follows just what was wanted for the first time in the whole case. There isn't another document in this case, your Honor, which even mentions the subject
350 of that statement.

The COURT: I can assure you, Mr. Counsel, if I conclude that the matter is not properly before the Court, it will have no influence whatever upon the decision in the case.

Mr. FINN: Doesn't it drag through the whole record, your Honor?

The COURT: It may drag through the record, but counsel is entitled to make such legal arguments as he thinks are appropriate to support the proffer of the document. I cannot cut him off.

Mr. FINN: I should think we may do it now. He says he has authority right there. I cannot conceive of any authority that supports such a statement. I don't think any of us, in all of the years of practice any of us have had, that any such document has been offered and received by this Court. I challenge you to show one case that will show that.

Mr. CURLEY: Ex Parte State of New York, 256 U.S. 503.

The COURT: I will say again that it is my impression that this is not admissible. I am not going to be able to tell from listening to any extracts from an opinon that counsel is going to read to me whether it is sufficient for me to change my mind. It is easy enough to read extracts of opinions and get an entirely different view of the mat-

ter than when you read the entire opinion, and I will not be in a position even if he makes an oral argument
351 at this point to rule.

Mr. KLINE: Your Honor, this is such a highly objectionable document, I think it is perfectly appropriate for your Honor to reserve judgment, but I suggest to your Honor that you rule upon its admissibility after such argument has been made separately. I think it is a separate situation. I do not want to encumber the record and go up to the Court of Appeals possibly with it if it is not properly in the case.

I would like to suggest that you reserve a ruling on that, but you do make a separate ruling on this point.

Mr. CURLEY: Your Honor please, if this document is ruled out of evidence that is an argument which is reversible error which we would have to take on appeal. The document should be in evidence so that when the appeal comes before the Court of Appeals they can review this document and rule on the admissibility of it, if your Honor subsequently decides that you are not going to admit it.

Mr. KLINE: Just a ruling and an exception is necessary and you can let him take his point up on appeal, but I do think it should be separately ruled upon.

Mr. CURLEY: The document should be before the Court of Appeals.

Mr. KLINE: I say we certainly would except if you let it in, and I think the other side could take the same
352 remedy if you were to exclude it, as you presently indicate you will.

I do think we are entitled in view of the nature of this document, and I am not talking about the other objections, to a separate ruling upon its admissibility. I am perfectly willing to brief it if you would rather have it done that way.

The COURT: Counsel can handle it any way they choose.

Mr. CURLEY: It is my feeling that it should be in the record, and we will brief it as part of our brief to the Court, and the Court in its opinion can rule then as to the admissibility or nonadmissibility of that document.

The COURT: I do not have to rule in the opinion, I can rule on it any place it is appropriate, I can make an order or do it as part of the judgment.

Mr. FINN: I think the line should be drawn somewhere.

The COURT: But you are not going to be able to keep the eyes of the Court away from this document, if that is what you are trying to do.

Mr. KLINE: We asked you to read it.

The COURT: I have already read it.

Mr. FINN: I asked you to read it before you discussed it.

353 The COURT: This is not a jury case, as I remarked before, and I do not think any judge will be fooled by any material that is improper.

Mr. FINN: I think it is just going too far that it is even offered in evidence, your Honor.

The COURT: Let us bring this to a head. I have stated before that in my opinion, as presently advised on this, I think it is inadmissible. I am perfectly willing to have counsel for the Respondent develop the legal arguments which he says that he has to support its admissibility. I will give him that opportunity.

Mr. FINN: Did you mean at the time of the final brief or which did you have in mind?

The COURT: He may do it in any way he chooses, through argument in his brief or he may, if he so desires, submit a memorandum of authorities.

The CLERK: Exhibit G for identification.

(The document referred to was marked Respondent's Exhibit G for identification.)

Mr. CURLEY: In view of the statement that you have made, I believe I should offer into evidence, so that your Honor can see it at the same time he reviews the document just offered, a series of four letters which are certified to by the Assistant Secretary of State, Mr. James E. Webb as being true copies of documents in the files of the Department of State. They actually pertain to the re-

354 quest for the State Department to ask for such a document that has been offered as Exhibit G, and the transmittal letters to and from the British Government to the Secretary of State through the Embassy, and I would offer that as Exhibit H.

Mr. FINN: The same objection, your Honor. We are going a little further each time.

Mr. CURLEY: I think I am entitled to, whether Petitioner believes it or not, at least offer the documents.

The COURT: I will reserve judgment on this and you can reserve argument of this as well.

(The document referred to was marked Respondent's Exhibit H for identification.)

The COURT: Off the record.

(Discussion off the record.)

The COURT: On the record.

Mr. Beddow: May I make a short motion? I had intended waiting until the conclusion of the hearing, but if I could just make a motion which will take thirty seconds, I will not have to come back this afternoon.

I would appreciate it if I could be heard.

The Court: Who are you?

Mr. Beddow: My name is Thomas J. Beddow, and I represent American Foreign Steamship Company which is the Petitioner in Docket 892-R, another one of these Red Sea renegotiation cases.

355 The issues presented in this proceeding are involved in that proceeding. While the facts in the American Foreign Steamship case are in some respects different than the facts in this case, nevertheless the determination of this case undoubtedly will have an effect on the interests of my client, and therefore I would ask leave to file a brief as amicus curiae in this proceeding.

The Court: You have permission to file a brief subject to the condition that you file it no later than the time within which the brief is due for the side whose position you are supporting.

Mr. Beddow: Thank you, your Honor.

The Court: We will recess at this time until two o'clock.

(Whereupon, at 12:30 o'clock p.m., a recess was taken until 2:00 o'clock p.m., this same day.)

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356 Afternoon Session

(The hearing was resumed at 2:00 o'clock p.m., upon the expiration of the recess.)

Mr. Curley: Shall we proceed?

The Court: You may proceed.

Mr. Curley: I would like to offer as Respondent's Exhibit I, a true copy of a memorandum from the Director of Operations and Traffic of the Maritime Commission to the Director, Division of American Shipping, Maritime Commission, dated June 27, 1941, which sets forth, among other things, the various dates of sailing of Red Sea vessels, including the one at issue in this proceeding.

The Court: What is the purpose of that?

Mr. Curley: Your Honor, I offer this to show the control of the Maritime Commission over these vessels, that the vessels did in fact sail.

Mr. Finn: I object; it is not stipulated that the vessels sailed on a certain date.

Mr. CURLEY: Excuse me; I mean vessel.

The COURT: This appears to be an interoffice memorandum and I think it is getting pretty far afield from this case.

I sustain the objection.

Mr. CURLEY: We will withdraw that.

Your Honor, I will offer as Respondent's Exhibit I, a memorandum from Mr. Philip Young of the Treas-
357 ury Department to Mr. Harry Hopkins; there is no office, but Mr. Harry Hopkins, Presidential Assistant. This has been certified as coming from Mr. Hopkins' papers and I offer this to show that there was to be established these trips, including the one which is in issue here.

I do not think Mr. Finn will object to the authenticity.

Mr. FINN: Of course I do not object to the authenticity, but I do object to the document.

The COURT: I sustain the objection.

Mr. CURLEY: Your Honor, may I ask that this be lodged with the Court for purposes of keeping the record fully informed as to what we are attempting to show in this proceeding?

The COURT: It may be included in the files as an offer of proof, but I exclude it from admission into evidence.

This is something pretty far afield.

Mr. CURLEY: We have a problem here to show to you this entire operation.

The COURT: I want in all fairness to have in the record such offers of proof as you may wish to rely upon if this case is the sort that can go up on appeal. I have not any idea whether it is or not. If it does I think both counsel are entitled to urge any errors on appeal that the Court may have committed and I am just leaning over backwards to try to be fair to both of you on it.

358 It does seem to me that this document is pretty far away from this case and it again is similar to an interoffice memorandum.

You described it as a memorandum from one Philip Young to Mr. Harry Hopkins. I do not know why you insist on pressing these points.

Mr. CURLEY: I am not insisting. We have made affirmative allegations in our amended answer. I think that these documents are material and relevant to show the relationship you have to build up the whole relationship that occurred within this Government at the time, how it was initiated, how it was brought into being, and who was interested in it.

I have two other documents which are reports to Mr. Hopkins showing the various sailings and what had been shipped up to certain dates.

Mr. FINN: Your Honor, on that particular phase of the argument, there are two things. In the first place, what Harry Hopkins said to Philip Young had nothing to do with this petitioner; and, secondly, if you will notice the certificate there, that is one single document removed from Drawer No. 20. I think it is, or some drawer number, of the Harry Hopkins papers, and those papers are not accessible to us, never will be and, as a matter of fact, as I understand it, that is the one and only document that Mr. Curley could get out of that drawer. It seems to me
359 we are going pretty far when we can let some one even other than counsel decide what is going into the case. Counsel has asked for a lot of documents and he has not been supplied with them. Who is to decide what is to go in this case—counsel, the Court, or some outside person who says, "No, we won't supply those documents," or "We will supply this much of it." That is one little isolated memorandum out of all of Harry Hopkins' papers.

The COURT: What do you want to prove with this document?

Mr. CURLEY: I want to prove, your Honor, that the whole operation developed from higher authority, what occurred was reported to higher authority, that the agency relationship existed, that the Maritime Commission was a principal party, and interest, and that the Maritime Commission was being directed by the President, doing certain things and reporting to the President through his proper channel, that is, Mr. Hopkins, what was going on and what was being done by the Maritime Commission.

The COURT: There is not any doubt here that this was financed through Lend-Lease funds.

Your opponent does not controvert that, does he?

Mr. FINN: That is correct.

The COURT: And that therefore the United States was interested in the movements of the traffic. You do not
360 dispute that, do you, Mr. Finn?

Mr. FINN: Not at all.

The COURT: And therefore it would be wholly appropriate for reports to be made to interested officials of the United States with respect to the movements.

You concede that, do you not?

Mr. FINN: Yes, your Honor.

The COURT: What do you want to prove, then?

Mr. CURLEY: They have conceded, your Honor, what I wanted to prove with the documents, that the reports had to be made to higher authority.

The reports had to be made to higher authority and they were made.

Mr. FINN: You said reports were to be made on the progress of this operation. I agreed. There are other reports I tried to get and they are not produced. They are in the Government files.

Mr. CURLEY: Mr. Finn, that should not go unanswered. Every document that you have asked for has either been stipulated or supplied with one exception that you asked for yesterday.

The COURT: Let us not quibble.

Mr. FINN: I do not think you mean that literally.

Mr. CURLEY: Respondent rests, your Honor.

Mr. FINN: May it please the Court, without prejudice to our contention that the only relevant material
361 are the original documents and that the negotations before the reports and the reports afterwards are immaterial and irrelevant, by way of rebuttal to that in the event it is accepted by the Court, I would like to offer in evidence a copy of a letter which Admiral Land, Chairman of the Maritime Commission, sent to S. O. Bland, Chairman of the Committee on Merchant Marine and Fisheries, House of Representatives, under date of April 16, 1941, right in the middle of these negotiations, in which he was asking the Committee to approve with certain modifications the statute which subsequently specifically gave the Commission authority to charter vessels. That Act was passed June 6, 1941, and was known as Public Law 101.

Mr. Curley, I understand, will not question that this is a true copy of the letter and that it was sent as I said it was.

Mr. CURLEY: As to my objections, first, your Honor, I would like to ask if this was rebuttal to any testimony which I have offered here today. I do not believe that there is any testimony which has been offered as part of my case to which this should be directed on rebuttal; secondly, I would like to point out to your Honor that this is a letter written in regard to Public Law 101, which is not a law which is involved in this proceeding.

362 For that reason, we think it is irrelevant and immaterial to this proceeding.

The COURT: What is the purpose of the offer?

Mr. FINN: The purpose of the offer is to show that on April 16, 1941, the Chairman of the Maritime Commission, whether he was right or wrong, in his own mind and in the mind of the Commission, they did not have authority to charter vessels for such services as the Red Sea.

This goes directly to this idea that the Commission was the real charterer.

This letter along with other letters in the case and other documents show the state of mind of the Maritime Commission as to what they could do and what their authority was. It is rebuttal not alone to what was testified today, but, as your Honor realizes, with 95 exhibits there is a lot in there that supports, according to Mr. Curley, his statements made today that this was purely an agency and for and on behalf of the Maritime Commission.

This is a statement of the Chairman of the Maritime Commission, indicating that he had no authority to make such a contract. At least that is the way we interpreted it. It is the third paragraph. I will not read it, but I call it to your attention.

The COURT: I share the doubts that counsel for Petitioner himself has indicated as to the propriety of
363 this document going into the record. I think it is a bit removed from the main stream of the case as well as some of the documents of Respondent which I have admitted into evidence, for whatever they may be worth, and I will do the same here.

I doubt that it has much if any bearing upon the ultimate decision in this case and I will let it in for whatever it is worth.

Mr. CURLEY: Your Honor, may I take a standing exception to all adverse rulings?

The COURT: Yes.

Mr. CURLEY: Thank you.

The CLERK: Exhibit 79.

(The document referred to was marked Exhibit No. 79 and received in evidence.)

Mr. KLINE: We would like to mark that R-1, your Honor.

The COURT: The practice of the Tax Court has been to follow in sequence the exhibit numbers from the stipulation.

Mr. FINN: Why do we have A, B, C, D, E, and F on the other exhibits? We have six or seven and you want to make mine 79.

The CLERK: I gave it the next number, 79.

Mr. FINN: The stipulated exhibits are not all our exhibits. That is why I raised the point.

We would only have about ten of those. I am not squabbling whether they should be numbered 1, 2, 3, but
364 their exhibits today have been marked A, B, C, D, and F, and I submit that they should follow the stipulation numbers, too.

The COURT: This is merely the device for keeping clear in our own minds as to what we have before us. It would merely be confusing to have two series of numbers beginning with 1. It will be thoroughly kept in mind by everyone that Exhibits 1 to 78 are Exhibits pertaining to the stipulation. From 79 on out, if there are any more, the exhibits——

Mr. KLINE: May we suggest we take some more letters?

The COURT: The letters are used to identify the Respondent's Exhibits and the numbers are used to identify the Petitioner's Exhibits. It is a common practice in many of the cases where the exhibits are joint in the stipulation to have them both numbered and lettered, such as Exhibit A-1, B-2, C-3, and so forth. Evidently the parties did not do that here and they were all identified merely by numerical symbols. There is no doubt in my mind as to what exhibits are Petitioner's and what exhibits are Respondent's, so I think it would be conducive to clarity if we continued this system.

Mr. FINN: All right, we have that then as Exhibit 79.

Your Honor, I would like to offer also on the same basis the minutes of the meeting of the Maritime Com-
365 mission held on May 5, 1941, which is in the middle of these discussions about the Red Sea, which meeting pertained to the charter of vessels for the Red Sea service. I offer that and I understand that Mr. Curley does not question its authenticity.

Mr. CURLEY: I think that that offer is not quite clear, your Honor.

If I understand correctly, the meeting of May 5 of the Maritime Commission was relative to certain bare boat charters; is that correct, Mr. Finn?

Mr. FINN: It was a proposed program for Red Sea operations.

Mr. CURLEY: Your Honor has sustained objections keeping things out of the record on this presumably aside from the actual charter.

These charters suggested to the Court here, first, are bare boat charters and are not the same as the charters

which are at issue in this proceeding. For that reason, I can see no relevancy, where the actual charter is entirely different.

Mr. FINN: Your Honor, that is one of a series of documents leading up to another charter of the same form as the one involved here.

Mr. CURLEY: The charter which I know Mr. Finn is referring to is not exactly the same as the one which is at issue in this proceeding, your Honor.

366 THE COURT: I am groping a bit for the purpose for which this document is being offered.

Mr. FINN: Your Honor, it is part of four documents, that is, one of four documents, which will show—and I am referring to the documents now—that the Maritime Commission itself went into this Red Sea operation through the device of chartering four or five or six of their own vessels to American shipowners on the understanding and direction and control as a condition of the charters that they would in turn charter them to the British Ministry of War Transport, and under a form of charter virtually identical with the one involved in this case, and that the Maritime Commission drew back 95 per cent of the net profits on the voyage. I say it is material in this respect: that it is inconceivable to think that the United States Maritime Commission, the principal supposedly in this whole transaction, having its own vessels, would go through the merry-go-round of chartering its vessels to an operator to charter to the supposed agent and the agent supposedly doing it for the benefit of the Maritime Commission. I think this particular transaction in the over-all shows the complete absurdity of the agency theory.

I could do this, so you will have the whole thing when you want to rule on it: I will offer the four of them. You have the one there. Then there is the meeting of May 20,

367 1941, in which they approved the terms of the proposed bare boat charter, a copy of the bare boat charter, and then a meeting of June 6, 1941—remember this is right at the time we are all talking about—where the Maritime Commission formally approves the charter to be used for its own vessels in chartering them. I will read it to you:

> "RECOMMENDED that the Commission approve the attached form of charter for execution between American Export Lines and Isthmian Steamship Company . . ."

—those are the bare boat charters——

". . . and the British Ministry of War Transport on Maritime Commission vessels chartered to the former two companies for Red Sea service."

The COURT: I think we are getting pretty far afield, but again I will admit these documents for whatever they are worth.

The Clerk will give them identifying symbols.

The CLERK: Exhibit 80.

The COURT: These documents will be admitted as a single exhibit, exhibit 80.

(The documents referred to were marked Exhibit No. 80 and received in evidence.)

Mr. FINN: Your Honor, there is one more document which I asked the Government counsel to produce and Mr. Curley has tried to get it, but he has not yet received it from the Maritime Commission. I would just
368 like to keep the record open for the purpose of introducing that document when it comes.

Mr. CURLEY: I think in all fairness we should keep the record open for that telegram received yesterday in which you could not produce the answer for me. That is the King letter. I mean I have never seen it and I would like to keep the record open for that purpose.

The COURT: Let us take these up one at a time.

The document that Mr. Finn wishes to introduce is or is not objected to?

Mr. CURLEY: Your Honor, I have only seen what they say is a facsimile. It was issued to another company. I do not know what it actually says. I do not know whether I could say that I object to it or not object to it. I would like not to object if I knew what it was.

The COURT: I do not wish to keep the record open for the introduction of a document where I cannot tell whether the parties are in agreement or disagreement as to its admissibility.

Suppose you are in disagreement; do you want to come and have an argument before me on that? I do not think that is an efficient way to handle litigation.

Mr. FINN: Also, your Honor, it should not take the Maritime Commission a week to find it. It was their certificate. I gave them the number and the date.

369 Mr. CURLEY: You gave it to me yesterday.

Mr. FINN: I gave the number and date of the document and they ought to be able to find it.

Mr. CURLEY: I have asked for the document and that is all I can do.

I told you I would try to get it.

I suggest this, your Honor: I have no objections to Mr. Finn making a motion to file this document when he gets it and to be included in the record, with permission to me to say one way or the other, whether I object or do not object. I will attach such a statement to Mr. Finn's motion. I have no objection to it, but I still want to protect the Government's position. I do not want to give carte blanche to just what this is going to be and what it is going to say.

The COURT: Suppose we do it this way: the record will be kept open for the purpose of submitting the document referred to for a period of ten days and I suggest that it be submitted not by motion, but rather by a stipulation of the parties, the Government reserving any objection to relevance that it may wish to stipulate, that it may be admitted subject to any objections as to relevance.

Mr. CURLEY: May I also make that same exception to the one document which has been referred to in this discussion, an alleged letter from a gentleman by the name of King which I have never seen?

370 If I want to offer that, I would like to do it on the same basis as Petitioner's counsel.

The COURT: The record will be kept open for ten days for that purpose.

It will be understood, of course, that each party will endeavor to give the other a sufficient amount of time within that ten day period to examine the document that he wishes to enter.

Mr. FINN: Petitioner rests.

Mr. CURLEY: I would like to make one statement.

It is my understanding that the documents which I offered as exhibits before lunch are now a part of the record in this proceeding, that you were going to rule on subsequently. I refer to the ones that you let in subject to be ruled upon subsequently. They are in the record?

The COURT: They are before me to rule upon just as the others are before me to rule upon.

Mr. FINN: The only difficulty is that in order to write the briefs here, are we to assume that all of these documents are admissible as evidence and have to argue from the documents?

In other words, how can you write a brief if you do not know whether the document is going to be admitted, par-

ticularly the one we are talking about, that letter
371 from Cross? If those are in or out it makes a big difference in both briefs, and I think that particular document should be separately briefed and either admitted or not.

The COURT: Would the parties care to submit preliminary briefs upon the documents on which I have withheld a ruling?

Mr. CURLEY: I prefer one brief and submit it all together.

The COURT: I will accommodate myself to the desires of counsel.

Mr. FINN: My desire is for one brief as to that particular document from Cross. That is the one, as you can realize, that I feel quite strongly about.

As you can realize, counsel will say this document is admissible in evidence because of A, B, C, and D, and he will go on and argue and quote from the document, which I think is not the way it should be handled. As to that particular document, I think it should be separately briefed and ruled on before it goes into the record.

We should have a firm ruling on that. That can be done in a very short memorandum by both parties as to its admissibility.

Mr. CURLEY: I object to that procedure, your Honor. I think you said earlier, and I am just trying to keep the record so that I am not going——

372 The COURT: Mr. Counsel, I could have ruled on those today, I can rule on those tomorrow, and I can rule on those three days from now. The parties will please have in my hands within ten days a memorandum of law on the admissibility of the documents that I have withheld rulings on this morning.

If the memoranda of law are not in, I will render my rulings nevertheless at that time.

I could rule on them this afternoon. Counsel for the Government was prepared to argue the thing orally this morning. He wanted to quote from some decision which he felt was in point. I did not want to hear the quotation because it is out of context and I would have had to read the entire opinion to see what weight I could give to it. Ten days is surely an adequate amount of time to write what should probably be a comparatively brief memorandum of law on these points.

On the matter of briefs, Petitioner's brief will be due in forty-five days. Respondent's brief will be due thirty days

thereafter, and if Petitioner desires to reply he may do so twenty days after respondent's.

I have before me also a motion for leave to file an amicus brief on behalf of the Viking Corporation.

Mr. MARX: May I change that motion a little bit? I do not want to unduly burden the Government.

The COURT: Will you please state your name?

373 Mr. MARX: Henry M. Marx of Paine, Kramer & Marx, on behalf of the Viking Corporation.

As far as the stipulation of facts, a copy of which I requested in my motion papers, I have arranged with Mr. Finn to get a copy of that from him and I have also arranged with Mr. Curley that if possible he will have run off an extra copy of his brief for me, so if we may have leave to file our brief amicus curiae based on that understanding, it will be very much appreciated.

The COURT: Whatever arrangement you have with either counsel is a matter of concern only to you.

I am simply granting you permission to file an amicus brief. I am not entering any kind of an order whatever requiring the parties to submit any of their documents to you. That is a matter of convenience between you and the parties.

You may file a brief amicus not later than the date within which the brief is due for the side whose position you are supporting.

Mr. FINN: One thing more, your Honor.

On the reply brief, I would like to have thirty days and I say that in advance because, as you can appreciate, our primary case is relatively short and our main brief is going to have to be in answer to his answer, that is, answering our brief, and twenty days may not be sufficient and if you could give us thirty days, it would be on the safe

374 side.

I do not want to have to come in and ask for additional time.

The COURT: Would you prefer to have thirty days, then, for your opening brief?

Mr. FINN: That would suit me much better.

The COURT: Very well. I will give you thirty days for your opening brief, thirty days for the Government to respond, and then thirty days to Petitioner to reply.

The Court will adjourn until Monday at 10:00 o'clock.

(Whereupon, at 2:37 o'clock p.m., Friday, March 16, 1951, the hearing in the above-entitled matter was adjourned.)

375 **EXHIBIT 79**

United States Maritime Commission
Washington, April 16, 1941.

Hon. S. O. Bland,
Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives.

Dear Judge Bland:

You have requested the views and recommendations of the Commission with respect to H. R. 4088, a bill to authorize the United States Maritime Commission to charter and purchase available vessels of domestic and foreign registry and to provide necessary insurance and reinsurance for such vessels and their operations.

The bill would authorize the Maritime Commission, until July 1, 1942, to charter and purchase vessels, whether of United States or foreign documentation, whenever the Commission finds that vessels (in addition to those otherwise available) are necessary for the transportation of foreign commerce of the United States or of commodities essential to national defense. The legislation would further authorize the Commission to charter out such vessels on time or bareboat basis to private operators—citizens of the United States, or to other Government agencies, and in case of vessels purchased by the Commission, to operate them. The bill provides that, under such charters, vessels may be used in any foreign trade, but, unless of United States documentation, not in the domestic trades. In general, the terms, conditions, and rates or prices in respect of charters or purchases would be such as the Commission deemed to be fair and reasonable and in the public interest. The construction fund of the Commission would be made available to carry out the provisions of the legislation. It is expressly provided that the legislation shall not be construed to modify or affect any provision of the Neutrality Act of 1939.

Under existing law, the Commission is not authorized to procure vessels by charter. Under title VII of the Merchant Marine Act, 1936, as amended, the Commission may charter out vessels owned by the Commission, under certain conditions and for use in essential trade routes, and may operate certain of its vessels under specified conditions when it is unable to sell or charter them for operation in essential trade routes. The Commission has a limited authority to purchase vessels (constructed in the United States) under

section 215 of the Merchant Marine Act, 1936, as amended, for use on essential trade routes. The Commission would have authority to acquire and operate vessels owned by United States citizens under section 902, as amended, of the 1936 act, but this section is not operative until the President proclaims that a national emergency exists or that the security of the national defense makes advisable the requisition or purchase of such vessels.

The bill (sec. 1(b)) also authorizes the Commission to provide with the insurance fund authorized by the subtitle "Insurance" in title II of the 1936 act, insurance and reinsurance with respect to vessels chartered under the bill where adequate and satisfactory insurance is not obtainable at reasonable rates and upon reasonable terms and conditions. The Commission, under section 10 of the Merchant Marine Act, 1920, as amended, may insure vessels to
376 the extent of the Government's equitable interest therein, and under sections 221 to 228 of subtitle "Insurance" of the 1936 act, as amended, may provide insurance and reinsurance of marine and war risks on vessels documented under the laws of the United States and on vessels controlled by the Government.

Section 3 of the bill would limit the use of vessels chartered or acquired under the legislation to transportation to the United States and its possessions and leaseholds of essential national-defense materials, or to service in coastal or intercoastal trade as replacements of vessels withdrawn therefrom in the interest of national defense during the emergency period.

The legislation would, through voluntary transactions, aid in making more effective use of tonnage which is immobilized or for other reasons is not being used, or which could be used to better advantage both for the defense program and for commercial service, at least pending the time when the ships contemplated under the construction programs become available in numbers sufficient to fill the needs as they develop.

The need for tonnage in the American merchant marine has expanded to an extent not reasonably foreseeable when the Neutrality Act of 1939 was enacted, and not predictable in its present scope, even after the sudden expansion of the defense program by Congress in the summer of 1940. Among the cumulative factors piling up this need for tonnage are the rapid shifts in the Nation's export and import business, the requirements of the enormously expanded defense program, including defense aid to other

governments, the reduction of tonnage available for commercial use by the acquisition of ships by the Army and Navy, the building of the two-ocean Navy, the establishment of new outlying bases, the reduced and restricted operations of large foreign fleets which formerly operated in our commerce, the increasing damage to and destruction of ships, the withdrawal of foreign tonnage from its usual routes and services, and the need (as well as the opportunity) for American vessels to fill in and take over gaps left by such withdrawals.

These expanded and steadily increasing needs for tonnage naturally cannot be met at once by further speeding up or increase of new construction. While there has been a marked decline in tonnage in use in the domestic trades, the United States merchant vessels in foreign trade increased both in number and in carrying power during 1940 and a further increase of more than 10 percent in carrying power is anticipated by the close of 1941, largely because of the progress in replacing under the 1936 act the obsolete vessels with new and modern efficient vessels. However, the diversion of part of the new tonnage produced under the Commission's long-range replacement program to meet Navy and Army needs has dislocated the introduction of new vessels into the merchant service, even though it has not been possible to meet more than part of the military and naval requirements for tonnage. The bulk of the Commission's reserve fleet of World War construction has been disposed or made use of either to take advantage of the wartime market for obsolete tonnage and thereby to assist in financing modern replacements, to provide needed tonnage for the Army and Navy, to fill gaps resulting from Army and Navy acquisitions from private owners, or to meet other national-defense transportation requirements.

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The legislation should be of definite, even though limited, aid in making more tonnage available to meet the increased needs. With respect to the procurement of American tonnage, private owners of such tonnage may be willing to charter vessels to the Commission at a reasonable rate in order to secure a satisfactory rate of return for a definite period, possibly longer than private charterers would be willing to contract for.

It is believed also that under this legislation a considerable amount of foreign-flag tonnage could be procured and used to meet some of the needs referred to above by means of voluntary negotiations and arrangements with the

owners of such tonnage or lawful agents therefor and securing the necessary governmental and legal clearances. There are immobilized in ports of the Western Hemisphere about 230 foreign-flag vessels, of about 1,275,000 gross tons, and in ports of the United States between 80 and 85 vessels, of about 450,000 tons, excluding small vessels and vessels laid up temporarily for repair or reconditioning. Most of these immobilized vessels are Danish, French, Italian, and German, with a scattering of one or two from several other countries.

Some 70 vessels (Danish, Italian, and German) in ports of the United States and its possessions, including the Canal Zone and the Philippine Islands, have been taken into protective custody. It is suggested that the bill be amended so as to permit the use, under its provisions, of any immobilized tonnage that may be acquired by the United States by means other than voluntary transfer.

It is desirable that the Commission be able to provide for the use of vessels which might be chartered or purchased under the legislation to meet any of the needs referred to above and any other needs that may arise under constantly changing conditions. It is suggested therefore that the restrictions of section 3 be eliminated. It is desirable, however, to permit the use in the coastwise trade of vessels procured for use under the bill, and, to carry out this objective, it would be necessary expressly to authorize the employment in coastwise service of foreign-flag vessels so procured.

Looking at the merchant marine and defense situation from the national view point, the Government can place the vessels where urgently needed in the national interest. Government assistance in making the tonnage under consideration available for temporary use should help to reduce to some extent the danger of the overtonnaging of trades or services which otherwise may develop when the temporary or special need may cease.

If the restrictions of section 3 were omitted, additional domestic and foreign-flag vessels could be procured and made available for use to meet in part some of the more urgent needs for additional tonnage, including the transportation of strategic and critical materials, transportation to the newly acquired bases, replacement of vessels
378 in either domestic or foreign trades taken over or to be taken over by the Army and Navy, filling in of gaps left by the sale of obsolete tonnage, operation in foreign trade services established by American operators

to replace vessels withdrawn by foreign operators, and emergency uses in the maintenance of essential routes under the 1936 Act. (See House Committee Report No. 223 on the bill, H. R. 3252.)

Certain problems will arise in connection with the operation as part of the American merchant marine of any foreign-flag vessels procured under the act. Some of the vessels could not be successfully put in service without retaining or employing some alien engine-room personnel to operate the foreign-built engines. Many vessels will require repairs and some will require reconditioning before they can be used. It is probable that some vessels otherwise available and desirable could not qualify under the laws of the United States because of requirements as to crew accommodations.

In view of these problems of operation, it appears desirable that the bill be amended to make discretionary provision for the documentation under the laws of the United States of any foreign-flag vessels purchased or chartered by the Commission under the bill and for granting permission to operate such vessels in the American merchant marine without regard to certain provisions of law otherwise applicable to vessels of the United States insofar as necessary to enable these vessels to be so operated. Rights in respect of such documentation should be subject to termination or modification by the United States.

Foreign-flag vessels chartered or purchased by the Commission may under the bill be chartered to citizens of the United States (or Government agencies). In these cases it seems desirable to make United States documentation possible, but not to require it in every case. It may develop that continued operation under a foreign flag will most satisfactorily meet the operating problems involved. American companies now own and operate many foreign-flag vessels in our foreign trade, and some Government departments frequently have employed foreign-flag vessels. Whether vessels procured under this legislation are operated under domestic registry or foreign registry, as best may meet the operating problems involved, it is necessary to have authority to repair or recondition such vessels. If documented under the laws of the United States it will be necessary to make provision for permission to operate without regard to certain requirements of law as to United States citizenship of the personnel and as to crew accommodations.

It appears that foreign-flag vessels purchased or chartered by the Commission under the bill would be subject to

the second paragraph of section 9 of the Shipping Act, 1916, as amended, which would preclude the operation of such vessels under charter from the Commission as merchant vessels of the United States unless all laws governing merchant vessels were complied with, a practical impossibility in the case of these foreign-flag vessels. There should therefore be a suspension of the requirements of this paragraph in the case of vessels subchartered by the Commission to other Government agencies or to private operators.

379 The Commission, in view of the considerations above set forth, favors the enactment of the bill modified in accordance with suggestions herein made. There is attached hereto a draft of amendments to the bill designed to carry out the modifications suggested.

This report has been referred to the Director of the Bureau of the Budget in accordance with the usual procedure. His advice will be transmitted as soon as received.

Sincerely yours,

E. S. LAND,
Chairman.

380 EXHIBIT 80

May 5, 1941.

(Special Meeting)

Proceedings of the United States Maritime Commission

(By Notation)

Present: Vice Chairman Woodward, presiding, and Commissioners Dempsey, Macauley, and Vickery, a quorum.

Also Present: R. L. McDonald, Assistant Secretary.

The Commission convened at 3:20 P.M. and adjourned at 3:30 P.M.

Charter of vessels for Red Sea Service.

There was presented the following memorandum dated May 5, 1941, from the Director, Operations and Traffic, relative to the charter of the SSs. WEST JAFFREY and WEST NORNS to American Export Lines, Inc., and the SSs. WEST HARDAWAY and WEST ZEDA to Isthmian Steamship Company for operation in the Red Sea service:

"Subject: *Red Sea Service.*

"The Division of Emergency Shipping desires four of our reconditioned freighters placed immediately in service to

Red Sea ports, and as both American Export Lines, Inc., and Isthmian Steamship Company are regular operators in that trade it is proposed to allocate two vessels to each of these companies. The following vessels will be ready within a few days and preliminary arrangements have been made with these companies to take them over on bareboat charter:

American Export Lines, Inc.
WEST JAFFREY—ready New Orleans 5/5/41.
WEST NOHNO—ready New Orleans 5/9/41.
Isthmian Steamship Company.
WEST HARDAWAY—ready New Orleans 5/7/41.
WEST ZEDA—ready Galveston 5/13/41.

"They will load cargo at U. S. Atlantic or Gulf ports for Red Sea ports, and return with strategic materials and other cargoes from India, South and East Africa or Straits Settlements, as directed by the Commission. As H.R. 3252 gives the Commission the right to charter its vessels for use in foreign trade without competitive bidding or advertisement, authority is requested to negotiate charter party agreements with these companies.

"*Recommendation:*

"It is recommended that the Commission authorizes the Division of Operations and Traffic to negotiate charter party agreements for the SSs. WEST JAFFREY and WEST NOHNO with American Export Lines, Inc., and for the SSs. WEST HARDWAY and WEST ZEDA with Isthmian Steamship Company, and authorize delivery of these vessels under terms and conditions of charter party agreements to be signed by said companies satisfactory to the Commission.

(Signed) G. H. HELMBOLD,
Director, Operations and Traffic.

381 Thereupon, after discussion, the following preambles and resolutions were adopted by the unanimous "yea" vote of the members of the Commission present:

"WHEREAS, Section 3 of Public Law No. 46 (77th Cong.—1st Sess.) provides that whenever, during the national emergency declared by the President on September 8, 1939, to exist, but not after June 30, 1942, the Maritime Commission determines that operation in the foreign trade charter to a private operator of any vessel of the Commis-

sion available for the purposes hereof is necessary for the maintenance of the foreign commerce of the United States, and that the necessary service cannot be so provided as to meet effectively such needs under the provisions of the Merchant Marine Act, 1936, as amended, the Commission may, notwithstanding any other provision of law, charter such vessel to a private operator, a citizen of the United States (as defined in section 2 of the Shipping Act, 1916, as amended), for use in such foreign trades or services as the Commission may prescribe, on time or bare-boat basis, with or without competitive bidding or advertisement, upon such terms and conditions, for such period or periods, and subject to such restrictions, as the Commission may deem necessary or desirable for the protection of the public interest, and at such rate of charter as it may deem to be fair and reasonable in view of the attendant circumstances;

"WHEREAS, the Commission, because of the emergency affecting the foreign commerce of the United States, especially as to the transportation of materials deemed necessary to the defense of the United States, desires to charter immediately four of its vessels in the service to Red Sea ports;

"NOW, THEREFORE, BE IT RESOLVED, That the Commission, having considered the above-quoted memorandum dated May 5, 1941, from the Director, Operations and Traffic, hereby finds and determines that operation in the foreign trade under charter to American Export Lines, Inc., of the SSs. WEST JAFFREY and WEST NOUSO, and to Isthmian Steamship Company of the SSs. WEST HARDAWAY and WEST ZEDA, is necessary for the maintenance of the foreign commerce of the United States, and that the necessary service cannot be so provided as to meet effectively such needs under the provisions of the Merchant Marine Act, 1936, as amended;

"RESOLVED, that the Commission hereby approves and adopts the recommendation contained in the foregoing memorandum from the Director, Operations and Traffic;

"RESOLVED, that the proper officers of the Commission be, and they hereby are, authorized and directed to take any and all actions necessary and proper to carry out the action of the Commission as set forth in the preceding resolutions."

By the unanimous "yea" vote of the members of the Commission present, the meeting adjourned at 3:30 P.M.

A true record.

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Red Sea Service—Charter to American Export Lines, Inc., and Isthmian Steamship Company of certain of Commission vessels.

There was presented the following memorandum dated May 10, 1941, from the Director, Operations and Traffic, relative to the approval of terms for the charter of the SSs. WEST JAFFREY, WEST NOHNO, WEST DUBEE, and MS. GALVESTON, to American Export Lines, Inc., and SSs. WEST HARDAWAY and WEST ZEDA and MS. OLDHAM to Isthmian Steamship Company:

"Subject: *Red Sea Service.*

"In accordance with the direction of President Roosevelt to arrange for 2,000,000 tons of merchant shipping for national defense purposes, the Division of Emergency Shipping has secured the employment of a number American flag vessels for operation from U. S. ports to ports in the Red Sea as a part of this program. It has also arranged for the bareboat charter to American Export Lines and Isthmian Steamship Company of certain of the Maritime Commission vessels now being reconditioned. These companies are the operators on the route.

"It is proposed that all of the vessels in this Red Sea service will load outward cargo consisting of 'Lend-Lease' material to ports in the range from Mombasa to Bombay, and that certain commercial cargo as may be necessary to fill out the ships will also be booked. The vessels will return homeward with strategic materials required for national defense purposes from India, Straits Settlements, South Africa or such other ports as may be required by the Division of Emergency Shipping and Division of Operations and Traffic.

383 "Pursuant to authority granted to this Division by the Commission on May 5, 1941, we have negotiated with American Export Lines, Inc., and Isthmian Steamship Co., Inc., the following terms of charter for the operation of Commission owned vessels in this service.

"1. *Period.*

"Six months and such additional time as may be agreed upon between the parties.

"2. *Trade.*

"For operation between U. S. Atlantic ports and ports in the Red Sea and India. The vessels, however, at the request of the owner will call at such ports on the above

described route or elsewhere, and carry such cargo and in such quantities as the owner may require.

"3. *Charter Hire.*

"The charterer shall pay basic charter hire at the rate of $3.00 per deadweight ton per month, and as additional charter hire all net voyage profits after the payment of basic charter hire, charterer's fair and reasonable overhead expenses and an amount equal to 5% of the gross revenue derived from the operation of the vessel.

"Inasmuch as the charterer will be required to operate the vessels at the direction of the owner, it is to be provided that if there is no net profit after payment of basic charter hire and overhead, the basic charter hire shall be reduced by an amount equal to such loss to the extent of $2.99 per deadweight ton per month. It is possible that a loss may still be incurred on one or more vessels after deduction of the basic charter hire due to unusual risks which will be incurred in this operation, while a profit may be made on the other vessels. The agreement will accordingly provide for the protection of the charterer that the net profits of all vessels chartered to an individual operator for this service will be calculated in determining the results of the operations before deduction of basic charter hire.

"4. *Insurance.*

"The Commission's practice has been to carry hull and machinery (including disbursement) insurance on its own vessels in its own fund at a valuation of about $500,000, and to charge the operation with a premium comparable to commercial premiums. The practice of the Commission with respect to P & I insurance has been to have this written by commercial underwriters in the amount of about $100.00 per gross ton. It has not been the practice for the Commission to require war risk insurance on its vessels, but the freight rates in the Red Sea service have been predicated upon war risk insurance at premium not exceeding 5% of the declared valuation of vessels. Most of the operators are putting their vessels in for both ordinary marine risk and war risk at approximately $100.00 per dead-weight ton. The commercial war risk rate is currently quoted at 5% in the American market and 4½% in the English market. In view of the fact that the Commission is carrying marine risk insurance (hull and machinery) on its own vessels in its own fund, we believe that it should likewise carry war risk insurance in its own fund, charging the operation with rates comparable to commercial rates. We, therefore,

recommend that our vessels be put into our own fund for both marine risk and war risk at $100.00 per dead-weight ton and comparable commercial rates charged against the operation.

384 "5. The net profit or loss from the operation of the chartered vessels and also from the vessels assigned to American Export Lines, Inc. as loading agents is to be taken into account in determining 'net earnings' from the operation of subsidized vessels and services incident thereto;

"Any capital employed by American Export Lines, Inc. in the operation is to be taken into account in determining the capital necessarily employed in the operation of the subsidized vessels, services, routes and lines;

"The above provisions do not apply to Isthmian Steamship Company inasmuch as that company has no operating-differential subsidy agreement with the Commission.

"6. The Commission to have the right to assign additional vessels, substitute vessels, or withdraw any vessels named in the agreement prior to commencement of any voyage.

"7. The owner and the charterer shall have the right to terminate the charter on thirty days notice prior to termination of any voyage.

"8. Otherwise, the usual provisions of the bareboat form of charter shall apply.

"*Recommendation.*

"It is recommended that pursuant to the authority granted to the Commission by Public No. 46, the Commission approve the charter for operation as above set forth of the SSs WEST JAFFREY, WEST NOHNO, WEST DURFEE and MS. GALVESTON to American Export Lines, Inc., and the SSs. WEST HARDAWAY and WEST ZEDA and MS. OLDHAM to Isthmian Steamship Co., under Charter Party Agreements containing the terms and conditions as herein outlined, in form to be approved by the General Counsel.

(Signed) G. H. HELMBOLD,
Director, Operations and Traffic.

I concur:
(Signed) M. L. WILCOX,
Assistant Director, Emergency Shipping.

Chief Examiner:
(Signed) R. E. ANDERSON,
Director of Finance.

No legal objection if Commission makes determination required by Section 3 of Public No. 46.

(Signed) CARL F. FARBACH,
General Counsel."

Thereupon, after discussion, the following preambles and resolutions were adopted by the "yea" vote of Chairman Land and Commissioners Macauley and Woodward:

"WHEREAS, the Commission, on May 5, 1941, made the determination required by the provisions of Section 3 of Public Law No. 46 (77th Cong.—1st Sess.), and authorized the Division, Operations and Traffic, to negotiate charter party agreements for the SSs. WEST JAFFREY and WEST NOHNO with American Export Lines, Inc., and for the SSs. WEST HARDAWAY and WEST ZEDA with the Isthmian Steamship Company, and further authorized delivery of these vessels under terms and conditions of charter party agreements to be signed by said companies, satisfactory to the Commission;

"WHEREAS, pursuant to the above-mentioned action of the Commission, the Division of Operations and Traffic has negotiated terms for the charter of said vessels in the Red Sea service;

"WHEREAS, the Commission, because of the emergency affecting the foreign commerce of the United States, especially as to the transportation of materials
385 deemed necessary to the defense of the United States, desires to charter immediately additional vessels to the above-mentioned steamship operators for operation in the service to Red Sea ports;

"NOW, THEREFORE, BE IT RESOLVED, that the Commission, having considered the above-quoted memorandum dated May 10, 1941, from the Director, Operations and Traffic, hereby re-affirms its finding and determination of May 5, 1941, and finds and determines that operation in the foreign trade under charter to American Export Lines, Inc., of the SS WEST DURFEY and MS GALVESTON, and to Isthmian Steamship Company of MS OLDHAM, is necessary for the maintenance of the foreign commerce of the United States, and that the necessary service cannot be so provided as to meet effectively such needs under the provisions of the Merchant Marine Act, 1936, as amended;

"RESOLVED, that the Commission hereby approves and adopts the recommendation contained in the foregoing

memorandum of the Director, Division of Operations and Traffic;

"RESOLVED, that the Chairman or Vice Chairman and the Secretary or Assistant Secretary of the Commission be, and they hereby are, authorized and directed to execute and deliver in the name and on behalf of the commission and under its seal, the charter party agreements prepared by the General Counsel pursuant to the directions contained in the preceding resolution;

"RESOLVED, that the proper officers of the Commission be, and they hereby are, authorized and directed to take any and all actions necessary and proper to carry out the action of the Commission as set forth in the preceding resolutions."

386 June 6, 1941.

To: U. S. Maritime Commission.
From: Director, Operations and Traffic.
Subject: Charters for Maritime Commission vessels allocated for Red Sea service

Pursuant to action of the Commission on May 20, 1941, authorizing certain Maritime Commission vessels to be chartered to American Export Lines, Inc., and Isthmian Steamship Company for Red Sea service, the attached form of space charter has been prepared for execution between the above companies and the British Ministry of War Transport to cover these vessels. This form of charter has been cleared by myself and Mr. Goertner, Assistant General Counsel, under authorization of the General Counsel.

This form is the same as that which has been approved for execution between private owners of vessels and the British Ministry of War Transport, with the following slight modifications:

1. In the first paragraph, "Owners" has been changed to "Chartered Owners."

2. At the end of Clause 8, the following sentence has been added: "The Owners, their agents and brokers, in performing any duties required of the Charterers under this charter party shall be deemed the agents of the Charterers."

With these modifications, this charter is considered appropriate for use on Maritime Commission vessels engaged in the Red Sea service.

RECOMMENDED, that the Commission approve the attached form of charter for execution between American Export Lines and Isthmian Steamship Company and the British Ministry of War Transport on Maritime Commission vessels chartered to the former two companies for Red Sea service. If the Commission approves, there is attached an appropriate form of resolution. This resolution is the same as that approved by the Commission on May 29, 1941, with respect to privately owned vessels allocated to the Red Sea service, with changes made necessary by the fact that the present are the Commission's own vessels.

(Sgd.) G. H. HELMBOLD,
Director, Operations and Traffic.

WE CONCUR:
(Sgd.) M. L. WILCOX,
Division of Emergency Shipping

NO LEGAL OBJECTION:
(Sgd.) FRANCIS B. GOERTNER,
Assistant General Counsel

Approved by the Commission. Date 6-13-41.
W. C. PEET, JR.,
Secretary.

387 RESOLVED, FIRST, that the form of space charter annexed hereto be, and the same is hereby approved, for use on United States Maritime Commission vessels chartered to American Export Lines, Inc., and Isthmian Steamship Company, as authorized by the Commission on May 20, 1941, in sub-chartering said vessels to the British Ministry of War Transport.

RESOLVED, SECOND, that approval of specific charters under clause 28 thereof with respect to voyages thereunder, now or hereafter arranged for by the Commission, may be given on behalf of the Commission by (1) the Director of Operations and Traffic, or (2) the District Manager at New York, by telegraphic or telephonic instructions of the Director of Operations and Traffic, subject to the following requirements as to the filling in of blanks:

1. The total bale capacity to be set forth in clause 1 of the charter and the total bale capacity and the deep

tank bale capacity to be filled in in clause 15 of the charter shall be in accordance with Certificate of a Measurer of the Treasury Department. If such Certificate cannot be obtained prior to the execution of the charter, approval may still be given but subject to verification of bale capacity by the Commission.

2. The figure for the adjustment of freight to be inserted in clause 2 and the demurrage rate to be inserted in clause 11 shall be in accordance with the formula annexed hereto. The determination as to the deadweight tonnage of the vessel is to be made either by the Director of Operations and Traffic or the New York District Manager.

3. The lay days to be inserted in clause 11 are also to be determined under the annexed formula and in accordance with the bale cubic capacity determined as in paragraph 1 including deep tank bale capacity only if usable.

4. There may be inserted in clause 24 a figure for insurance valuation for war risk insurance purposes not in excess of $100.00 per deadweight ton, the deadweight tonnage to be determined as in paragraph 2. If a higher valuation is agreed upon between the parties specific approval for the insertion thereof must be obtained from the Commission.

RESOLVED, THIRD, that the Director, Operations and Traffic, be, and he hereby is instructed to report periodically to the Commission each approval given by him or given by the District Manager at New York under his instructions pursuant to the provisions of RESOLVED SECOND hereof;

RESOLVED, FOURTH, that the approval of the Maritime Commission as required by sections 9 and 37 of the Shipping Act, 1916, as amended, be and is hereby granted for the charter of said United States Maritime Commission vessels to the British Ministry of War Transport, on condition that said charters shall be approved as authorized by RESOLVED SECOND hereof, and upon the further condition that said vessels may not be sub-chartered to aliens under this approval;

388 RESOLVED, FIFTH, that the Secretary or the Assistant Secretary of the Commission, under the seal of the Commission, be authorized to issue certificates with respect to each of said vessels that the charter thereof has been approved by the Commission pursuant to RESOLVED FOURTH of this Resolution.

389-390 Demurrage

Not exceeding 8,100 DWT	$2,000. per day
8,101 DWT to 9,000 DWT	2,250. " "
9,001 " " 10,000 DWT	2,500. " "
10,000 " and over	2,750. " "

Time

350,000 to 425,000 bale cubic cargo space	10 days
425,000 to 500,000 " " " "	12 "
500,000 to 600,000 " " " "	13 "
600,000 and over	14 "

391 Approved by the Commission.
Date: June 13, 1941.

W. C. Peet, Jr.,
Secretary.

CHARTER

..... 1941

It is this day mutually agreed between ..... hereinafter called the "Owners", chartered owners of the Steamship ..... of ..... tons net register, classed ..... now ..... and .... hereinafter called "Charterers", as follows:

1. That the said steamship, being tight, staunch and strong, and in every way fitted for the voyage and, according to Builders' scale and plan, which Owners believe to be correct but do not guarantee, has ..... cubic feet bale space available for cargo, and shall load at not more than two United States Atlantic Coast ports, north of Cape Hatteras, but not east of Portland, Maine, according to custom of port, a cargo of lawful merchandise, which Charterers shall furnish subject to Clause 25, and being so loaded shall therewith proceed as ordered when Bills of Lading are signed *to not exceeding two ports of discharge in the Gulf of Aden and the Red Sea range not beyond Suez, or so near thereunto as she may safely get,* .....
.....
.....
and there, always afloat, deliver the cargo as customary, at such wharf, dock or other good and safe place as Charterers' Agents may direct on arrival, in consideration whereof Charterers shall pay the vessel freight as follows:

Seventy-five cents (75¢), United States Currency, net per cu. ft., on the bale cargo capacity, as above stated.

For on-deck cargo Sixty cents (60¢), United States Currency, net per cu. ft. on cubic measurement of such cargo carried.

Entire freight to be prepaid, without discount, and except as provided in clause 2 (Two), to be considered as earned and not returnable, vessel and/or cargo lost or not lost.

If the Charterers find it necessary to discharge at port or ports other than in the range named above then the Charterers may order the vessel to discharge at not exceeding two ports in any one of the following ranges: Capetown-Mombasa Persian Gulf Karachi-Bombay.

If under these circumstances vessel discharges in ranges last named, the Owners shall refund to Charterers the following sums:

(a) Port or ports in Capetown.—Mombasa range—*Thirty cents (30¢)* per cubic foot bale space on which original freight was paid and *Twenty-four cents (24¢) per cubic foot of cubic measurement of on-deck cargo;*

(b) Port or ports in Persian Gulf *Twenty cents (20¢)* per cubic foot bale space on which original freight was paid and *Sixteen cents (16¢) per cubic foot of cubic measurement of on-deck cargo;*

(c) Port or ports in Karachi-Bombay range *Twenty-five cents (25¢)* per cubic foot bale space on which original freight was paid and *Twenty cents (20¢) per cubic foot of cubic measurement of on-deck cargo.*

Vessel shall not be required to discharge in more than one range.

Confirmation of discharging ports as ordered on sailing to be given on vessel's arrival off Mombasa within 12 hours. If longer detained awaiting orders, such additional time to count as lay days.

2. If by reason of changed conditions the Owners and Charterers agree, or in case of disagreement, the United States Maritime Commission determines, that the voyage shall not be prosecuted further or not completed, and the vessel is not lost and does not discharge at a port or ports, Capetown or beyond, adjustment of freight shall be made on the basis of U. S. $..... .... per day vessel is used by Charterer.

3. Steamer to have liberty to sail with or without pilots, and to tow and assist vessels in all situations. Steamer to have liberty to call at any port or ports en route or not, for fuel, and/or supplies.

4. Charterers to have the privilege of designating wharves, or other good and safe places for loading or discharging. The cargo to be brought to, and taken from alongside the Steamer, at Charterers' risk and expense, any custom of the port to the contrary notwithstanding. Lighterage, if any, at discharging port for the account of the cargo. Steamer to supply steam to drive winches, and to give use of gear on board vessel, also to load or discharge at night, on Sundays or holidays or on day when notice is given if required by Charterers. Charterers to pay all expenses and labor incurred on cargo, including overtime to crew for cargo working purposes.

5. Charterers are to load, stow, and trim the cargo at their own expense, under the direction of the Master. Charterers to pay all port charges incidental to the outward cargo at loading port or ports, including elevating, stevedore, tallying, watching, clerking, top wharfage, and to provide and fill sacks required to secure bulk grain, also all necessary shifting boards, dunnage and dunnage mats, if required, but Owners to pay all other charges at loading port.

6. Charterers' Agents to pay cost of discharging cargo, and all port charges incidental to the cargo at the discharging port or ports to which steamer may be ordered, but the Owners to pay all other charges at the discharging port or ports.

7. Charterers to have use of any dunnage or mats, etc., as may be aboard.

8. The Steamer shall be consigned to Charterer's Agents at ports of loading and discharge, and shall employ their Broker to attend to the Ship's business.

The Owners, their agents and brokers, in performing any duties required of the Charterers under this charter party shall be deemed the agents of the Charterers.

9. The Charterer's Agents shall sign Bills of Lading in behalf of the Master as and when presented, without prejudice to this charter-party. The captain, officers and crew of the vessel in supervising loading, stowing, trimming, tallying and discharge of cargo shall be deemed the agents of the Charterers, except in so far as such supervision pertains to the safety of the vessel. Except as otherwise provided in this Charter, neither the vessel nor the Owner shall be liable for shortage, damage, breakage, leakage, shrinkage or any other condition in respect to cargo arising without the actual fault and privity of the Owner and without the fault or neglect of Agents or servants of the Owner.

10. Lay days at port or ports of loading to commence on the day following receipt by Charterer's Agents of Captain's writ-

ten notice of readiness whether vessel is in berth or not. Should the Steamer not be ready to load on or before noon of ...., the Charterers have the option of cancelling this charter-party. Lay days at port or ports of discharge to commence on the day following receipt by Charterer's Agents of Captain's written notice of readiness whether vessel is in berth or not.

11. If the Steamer be not sooner dispatched cargo to be loaded and discharged in a total of ..... ( ) running days. Should the cargo not be loaded at loading port or discharged at port of destination within the specified time, for each and every day over and above said lay days, Charterers are to pay, day by day, the sum of ...., United States Currency, per day demurrage, any detention through Quarantine to Vessel not to count in lay days. Lay days allowed for loading and discharging are reversible. Lay days not to include time steaming between ports.

12. The clauses herein regarding payment of port charges, stevedores, etc., at ports of loading and discharge refer only to such charges as are ordinarily incurred, any extra expenses caused by the steamer being under average, are to be adjusted in the usual way. All spaces to be placed at Charterers' disposal, which would be used for cargo, if loading for Owner's account, and where cargo has been carried before.

13. Throughout this charter-party the following are always mutually excepted: The act of God; perils or accidents of the sea; causes beyond the shipowners or Charterers control; restraint or interference or compliance with any directions whatsoever by any Government; fire from any cause whatsoever or wheresoever occurring, unless caused by the actual fault or privity of the Owners or Charterers, as the case may be; war, hostilities, rebellion or civil commotion even though existing or anticipated when this charter is made or any bills of lading signed or voyage commenced hereunder; enemies, pirates, riots, strikes, lockouts, stoppage, shortage or lack of labor or labor troubles of the shipowner's employees or others; fault or error in the management or navigation of the vessel; unseaworthiness, latent or other defect even though existing at delivery or beginning of any voyage not resulting, however, from Owner's want of due diligence. Notwithstanding anything to the contrary in this charter-party, the Owner shall be entitled to any exemptions from or limitations of liability afforded by any statute or rule of law for the time being in effect.

14. Owners shall furnish Charterers with a copy of Vessel's scale and plan showing cubic capacities of all holds and spaces upon signing of this charter-party.

15. The bale capacity of ..... cubic feet according to builder's plan includes deep tank with a total bale capacity of ..... cubic feet. Freight is not payable on the deep tank space unless cleaned, fitted, and in every way made useable for cargo by Owners.

16. This charter-party includes, and all bills of lading issued hereunder shall include, subject to clause 1 of this charter, Chamber of Shipping War Clauses 1/2/3/August 1937:

WAR RISKS CLAUSE

"1. The Master shall not be required or bound to proceed to any blockaded port or for any port which the Master or Owners in his or their discretion consider dangerous or impossible to enter or reach nor to sign bills of lading for any such port.

"2. (A) If any port of discharge named in this charter-party or to which the vessel may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or

"(B) If owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law (a) entry to any such port or discharge of cargo intended for any such port be considered by the Master or Owners in his or their discretion dangerous or prohibited or (b) it be considered by the Master or Owners in his or their discretion dangerous or impossible for the vessel to reach such discharging port—the cargo or such part of it as may be affected shall be discharged at any other safe port in the vicinity of the said port of discharge as may be ordered by the Charterers (provided such other port is not blockaded or that entry thereto or discharge of cargo thereat is not in the Master's or Owners' discretion dangerous or prohibited). If no such orders be received from the Charterers within forty-eight (48) hours after they or their agents have received from the Owners a request for the nomination of a substitute discharging port, the Owners shall then be at liberty to discharge the cargo at any safe port which they or the Master may in their or his discretion decide on and such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment so far as cargo so discharged is concerned. In the event of cargo being discharged at any such other port the Owners shall be entitled to freight as if the discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses.

"3. The vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destination, zones, waters, delivery or in any other wise whatsoever given by the government of the nation under whose flag the vessel sails or any other government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation.

"If by reason of or in compliance with any such direction or recommendation the vessel does not proceed to the port or ports originally designated or to which she may have been ordered pursuant to the terms of the Bills of Lading, the vessel may proceed to any safe port which the Master or Owners in his or their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment and the Owners shall be entitled to freight as if discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses."

17. This charter-party includes, and all bills of lading issued hereunder shall include the New Jason Clause, reading:

"In the event of accident, danger, damage or disaster before or after commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods."

General average, if any, to be according to York-Antwerp Rules, 1924, Rule F, 1/15 inclusive and 17/22 inclusive, Owners shall be entitled to appoint General Average adjusters.

18. This charter-party includes, and all bills of lading issued hereunder shall include the Both-to-Blame Collision Clause reading:

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier."

19. All bills of lading issued hereunder shall include the Clause Parmount reading:

CARRIAGE OF GOODS BY SEA ACT OF 1936

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

20. A regular line bill of lading on booking agents' form to be used and all such bills of lading covering Charterer's cargo to be clausedas follows: "All terms and conditions and exceptions of charter-party dated New York ..... are hereby incorporated." This clause will not appear on bills of lading for commercial cargo, but Charterer's Agents to cover the Owner's liability with separate P&I coverage.

21. Charterers to comply with all Government regulations relating to loading, stowage and discharge of dangerous cargo.

22. Charterers shall be responsible for fulfilment of all requirements of Neutrality Act 1939 of the United States including any amendments thereof and all proclamations, rules and regulations thereunder so far as they relate to cargo.

23. On-deck cargo to be carried at sole discretion of Master and at the risk of Charterers and/or Owners of such cargo.

24. The freight to be paid under this charter is predicated on obtaining war risk insurance at a rate of 5% into the Red Sea on a valuation of ..... Any increase in this war risk insurance rate into the Red Sea to be added to the total freight, and any reduction to be deducted.

25. Charterer has the privilege of securing commercial or other lawful cargo to complete ship, or fill broken stowage space, to insure charterers securing maximum use of ship's capacity. The revenue on such cargo, less cargo handling expenses, P&I insurance premiums to cover B/L risk, deduction for cargo claims, brokerage if any and a commission of 5% to the booking agent (named in clause 8) to be credited to the Charterer.

26. Vessel to be berthed in United States ports at piers or terminals and to use facilities designated by the Charterer and approved by an authorized representative of the United States Maritime Commission. Consideration will be given to the use of Owner's terminals and facilties where practical.

27. Charterers have priviiege of appointing booking or loading agents in the United States approved by the United States Maritime Commission, but Owners not required to pay for this service in excess of one-fourth cent (¼¢) per bale cubic as above, subject to a maximum of One Thousand Dollars ($1,000). Charterer's Agents to be used at discharge ports and for which agency fees will be allowed in an amount not exceeding one hundred and twenty-five dollars ($125) for each port.

28. This charter not to become effective until approved by the United States Maritime Commission. If any dispute arises under this charter the same is to be settled by the United States Maritime Commission.

Approved by the Commission.
Date: 6–13–41.

W. C. PEET, Jr.,
Secretary.

392 Contract No. MCc 1493

AGREEMENT

FOR CHARTER OF VESSELS FOR OPERATION IN THE GULF OF ADEN-RED SEA RANGE BY ISTHMIAN STEAMSHIP COMPANY

THIS CHARTER PARTY AGREEMENT made as of the 5th day of May, 1941, between the UNITED STATES MARITIME COMMISSION (herein designated as the "Owner") and ISTHMIAN STEAMSHIP COMPANY, a corporation organized and existing under the laws of the State of Delaware (herein designated as the "Charterer"),

WHEREAS:

1. The Owner has determined, pursuant to the provisions of an Act of Congress, approved May 2, 1941 (Public No. 46—77th Congress, Ch. 84, 1st Session), that operation in

the foreign trade under charter to the Charterer, a private operator and a citizen of the United States (as defined in Section 2 of the Shipping Act, 1916, as amended) is necessary for the foreign commerce of the United States, and that the necessary service cannot be so provided as to meet effectively such needs under the provisions of the Merchant Marine Act, 1936, as amended.

2. Because of the emergency effecting the foreign commerce of the United States, especially as to the transportation of materials deemed necessary to the defense of the United States, the Owner desires to let the vessels hereinafter named for operation in the trade routes hereinafter described, for the period, upon the terms and conditions, subject to the restrictions, and at the rate of charter hire provided for in this Agreement, and in connection therewith has made the findings and determinations required by said Act of May 2, 1941, and the Charterer is willing to hire said vessels in accordance with the provisions of this Agreement.

A. The Vessels and the Routes

1. *Vessels Chartered.* The Owner agrees to let, and the Charterer agrees to hire, for the period and upon the terms and conditions, the following, of approximately the tonnage indicated:

393 *Name*	*Deadweight Tonnage*
WEST HARDAWAY	8624
WEST ZEDA	8500
OLDHAM	8983

2. *Substituted, Withdrawn, or Additional Vessels.*

(a) The Owner may substitute for any of the vessels chartered hereunder other cargo vessels satisfactory to the Charterer presently owned by the Owner, or the ownership or use of which may hereafter be acquired by the Owner, and may add other cargo vessels, satisfactory to the Charterer, similarly now owned or hereafter acquired by the Owner, for operation in the trade routes herein specified, with like right of substitution as to such additional or substituted vessels.

(b) Upon delivery of substitute or additional vessels for operation under this Charter Party Agreement, all the provisions hereof shall be applicable to such vessels, subject to provisions of law then in effect; provided that such adjustment of the basic charter hire may then be made (1) as may be required by then existing provisions of law, and (2) as the Owner may deem fair and equitable.

(c) If the Charterer shall refuse to accept delivery of substituted or additional vessels, because such vessel is unsatisfactory to it, or by reason of failure to agree upon the proper charter hire for such vessel, or for any other reason whatsoever, it shall redeliver, as provided in Article 10 hereof, promptly all vessels then being operated hereunder which are not then on voyages and shall redeliver all other vessels as soon as may be practicable after discharge of their inbound cargoes, and upon the redelivery of the last of such vessel this Charter Party Agreement shall terminate.

(d) The Owner may withdraw any of the named vessels prior to delivery thereof upon written notice to the Charterer without incurring any liability to the Charterer by reason of such withdrawal.

3. *Trade Routes.* The Charterer shall maintain and operate the vessels in a service on the following described route:

394 Via the Cape of Good Hope between United States Atlantic coast ports, and ports on the Red Sea (not north of Suez), the Gulf of Aden, and the Indian Ocean and Arabian Sea, Mombasa-Bombay range.

However, at the request of the Owner, the Vessels shall call at such ports (on the above described route or elsewhere) and carry such cargo, in such quantities, all as the Owner may require.

B. Delivery of Vessels—Period of Charter

4. *Delivery of Vessels.* The above named vessels shall be delivered by the Owner to the Charterer at such places and at such times as may be mutually agreed upon.

5. *Period of Charter.* This Agreement, unless sooner terminated as hereinafter provided, shall be for a period of six months from the date of delivery of the first vessel delivered hereunder and such additional time as may be agreed upon between the parties, and, at the request of the Charterer, for such additional time as may be required to complete any voyage on which a vessel is being operated at the termination of such six months (or extended) period. Such six months period, together with any extensions thereof, is referred to herein as the "charter period".

C. Charter Hire—Bond

6. *Basic Charter Hire.* The Charterer shall pay to the Owner during the charter period from the respective dates of delivery of the vessels until and including the dates of respective redelivery pursuant to the terms hereof, or if any vessel is lost, until and including the date of its loss (if the time of such loss is uncertain, then until and including the date such vessel was last heard from), in the case of the named vessels Three Dollars ($3.00), and in the case of other vessels the monthly basic charter determined pursuant to Article 2 hereof, per month per deadweight ton per vessel as monthly basic charter hire. Such basic charter hire shall be paid to the Owner in cash at its office in Washington, D. C., in advance on the first day of each and every month during the charter period, except that upon delivery and redelivery, otherwise than on the first day of the
395 calendar month, the basic charter hire shall in case of delivery be paid at the time of delivery with respect to the remainder of such month, and in case of redelivery Charterer shall be enittled to refund of basic charter for the unexpired portion of such month. If the operation of all the vessels results in a combined net voyage loss for the charter period (after the payment of such basic charter hire and payment of the Charterer's fair and reasonable overhead expenses applicable to the operation of the vessels), the basic charter hire shall be reduced by an amount equal to such loss; provided, that the aggregate amount of such reduction shall not in any event exceed an amount equal to the difference between the aggregate amount of such basic charter hire and a total charter hire computed on the basis of One Cent ($.01) per deadweight ton for all the vessels for the charter period.

7. *Additional Charter Hire.* The Charterer shall pay over to the Owner at Washington, D. C. as additional charter hire, the amount, if any, by which the aggregate net voyage profits of all voyages made hereunder (after the payment of the basic charter hire provided herein and the payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the vessels) exceeds an amount equal to 5 per cent of the gross revenue derived from the operation of the vessels.

Such additional charter hire shall be paid within ninety days after the completion of the last voyage on the basis of the Charterer's computations made in accordance with the

accounting methods herein prescribed, subject to adjustment upon final accounting.

8. *Bond.* The Charterer, simultaneously with the execution of this Agreement, will furnish the Owner with a bond with sufficient surety, in an amount of not less than $75,000.00, such bond to be approved by the Owner, both as to form and sufficiency of surety, and to be conditioned upon the true and faithful performance of all and singular the covenants and agreements of the Charterer contained in this Agreement, including but not limited to, the Charterer's obligation to pay charter hire. The Charterer may, in lieu of furnishing such bond, pledge United States
396 Government securities in the face value of the required amount under an agreement satisfactory in form and substance to the Owner. If additional vessels are delivered, the Owner may require the furnishing of additional bond or increased bond (or at Charterer's option the pledge of additional securities) not exceeding $25,000.00 with respect to each such additional vessel.

D. Condition of Vessels: Equipment and Stores

9. *Condition of Vessels on Delivery.* All vessels, upon delivery, shall be tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, and equipped, and shall be in every respect seaworthy and in good running order, condition, and repair, so far as due diligence can make them so.

Subject to such exceptions as may be noted in the report on the survey to be made upon delivery of each Vessel pursuant to the provisions of Article 11 hereof and accepted by the Owner and the Charterer as being correct or as being subject to future adjustment, the delivery of each vessel by the Owner and the acceptance of each vessel by the Charterer shall constitute a full performance by the Owner of all of the Owner's obligations under this Article with respect to such vessel, and thereafter the Charterer shall not be entitled to make or assert any claim against the Owner on account of any representations or warranties, expressed or implied, with respect to the vessel, but the Owner shall be responsible for repairs or renewals occasioned by latent defects in the vessels, their machinery or appurtenances, existing at the time of delivery under this Agreement, which defects are not discovered on the survey provided for in said Article 11.

10. *Redelivery of Vessels.* All vessels shall, except as herein otherwise provided, be redelivered to the Owner (unless lost) at the Port of Norfolk, Virginia, or at such other port as may be agreed on, in the same or as good order and condition as that in which they were delivered, ordinary wear and tear excepted.

11. *Surveys.* The vessels shall be surveyed before delivery and on redelivery to determine their condition.
397 The Owner shall have the right at any time, without notice, to inspect or survey the vessels at its own expense, to ascertain their condition and to satisfy itself that such vessels are being properly repaired and maintained, and the Charterer shall make, at its own expense, all such repairs as such surveys may disclose to be necessary for the proper maintenance of the vessels.

12. *Maintenance.* The Charterer shall, at its own expense, except as otherwise herein provided, maintain and keep the vessels and their machinery, boilers, appurtenances, and spare parts in good order and condition, and shall have the Vessels regularly overhauled and shall drydock, clean, and paint them as may be necessary, but at least once in every eight months from the respective dates of delivery or upon completion of the first voyage after the expiration of the six-month period, and shall keep each Vessel with full unexpired classification and other required certificates at all times.

The Charterer shall make no structural changes in the vessels and shall make no changes in the machinery, boilers, appurtenances, or spare parts thereof, without, in each instance, first securing the written approval of the Owner. The Charterer shall also promptly notify the Owner sufficiently in advance to enable its representative to be present at repairs, drydockings, or surveys of the Vessels, and shall furnish the Owner with copies of reports made with respect thereto. In making repairs the Charterer shall use only first class materials or equipment, of the type and kind of that repaired, or materials or equipment obtained from the Owner's stock.

Should any dispute arise between the Owner and the Charterer at the time of redelivery with respect to responsibility for repairs, renewals, or replacements, or as to the condition of the vessels at that time, either the Charterer or the Owner may without prejudice to its contentions make and pay for such repairs, renewals, or replacement or any part thereof, before or after tender of redelivery and may

recover such part of the cost thereof borne by such party from the other party to the extent that such other party may be responsible therefor under the terms of this Agreement. In the event that the Charterer's liability for such repairs, renewals, or replacements is established, the
398 Charterer shall pay hire at the basic charter hire rate applicable to the particular vessel, for the time lost in making such repairs, renewals, or replacements, and also reimburse the Owner for vessel expenses during the period of time necessary for such repairs, renewals, or replacements.

13. *Use of Equipment.* The Charterer shall have the use of all outfit, equipment, appliances, spare and replacement parts on board the vessels at the time of delivery, without extra cost (except any leased equipment); provided the same or their substantial equivalent shall be returned to the Owner on redelivery, in the same good order and condition as when received, ordinary wear and tear excepted, any such items lost, destroyed or consumed in service being replaced by the Charterer. Shortages shall be paid for by the Charterer at the prices agreed upon pursuant to Article 15, and any overages, accepted by the Owner, shall be credited at the then current market price at the port of redelivery. The Charterer shall assume the obligations of the Owner under any contracts in connection with leased equipment, if any, and shall reimburse the Owner for all expenses connected therewith after delivery.

14. *Fuel and Stores on Board Vessels at Delivery and Redelivery.* The Charterer shall accept and pay for all fuel and consumable stores on board the vessels at the time of their delivery at the current market prices prevailing on the respective delivery dates at the respective ports of delivery, and the Owner shall accept and pay for all such fuel and stores left on board on redelivery (except perishable stores) at the current market prices at port of redelivery.

15. *Inventories.* Complete inventories of the entire equipment, outfit, appliances, spare and replacement parts of the vessels, and of all consumable stores on board, as of the time of delivery, shall be taken and mutually agreed upon, both as to items and price, at such time or as soon thereafter as may be practicable, and similar inventories shall be taken and mutually agreed upon at the time of redelivery. Items other than fuel and consumable stores included in the delivery inventories, however, shall not be repriced at the time of redelivery.

399 E. Operation of the Vessels

16. *Charterer to Man, Operate and Supply.* The Charterer shall, at its own expense, man, operate, victual, fuel and supply the vessels, and shall pay all port charges, pilotage, and other navigation expenses, taxes, stevedoring and other cargo handling expense, and all other costs and expenses incident to the operation of the vessels on the route. The Masters and Chief Engineers on the vessels, however, shall be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any Master or Chief Engineer, if it shall have reason to be dissatisfied.

17. *Insurance.* The Charterer, at all times during the charter period, shall, at its own expense, carry and maintain on each vessel insurance covering all marine and port risks, protection and indemnity risks, and all other hazards and liabilities, including those of capture, seizure, arrest or detention or of any damage to the vessels, their machinery or appurtenances, resulting from warlike or hostile operations, in such amounts and in such form and in such insurance companies as the Owner may require and approve, adequate to cover all damages claimed against and losses sustained by such vessel, her machinery or appurtenances. The hull and disbursement insurance, including war risk coverage on each vessel shall be in an amount of not less than $850,000. The P. & I. insurance shall be in the amount of approximately $150 per gross ton.

All losses under the policies of insurance carried on the vessels shall be made payable to the Owner for distribution by it to itself and the Charterer as their interests may appear. The originals of all policies, cover notes, and binders shall be delivered to the Owner for its custody and approval. In the event that any of the insurance hereinbefore provided for, by reason of any act, omission, or negligence of the Charterer, shall not be kept in full force and effect, the Charterer shall pay to the Owner all losses and indemnify the Owner against all claims and demands which would otherwise have been covered by such insurance.

400 Some or all of the aforementioned insurance risks may be underwritten by the United States Maritime Commission as, in its discretion, it may determine. Said Commission shall not, as either owner or insurer, have any right of subrogation against the Charterer on account of loss or damage to the vessels or their machinery or appurtenances or on account of payments made to discharge

claims against or liabilities of the vessels or the Owner covered by insurance so underwritten by said Commission.

18. *Efficient Operation.* The Charterer agrees to conduct its business and its operations with respect to the vessels in an economical and efficient manner.

19. *Bills of Lading.* All bills of lading issued for cargo carried on the vessels shall be in form satisfactory to the Owner, and shall include the "Jason" clause, as required by Article 20 of this Agreement, and said bills of lading shall provide that the carriage of goods shall be subject to all the provisions of and exemptions contained in the Act of Congress of February 13, 1893, known as the Harter Act, and the Carriage of Goods by Sea Act of the United States, approved April 16, 1936. The Charterer shall reserve a lien upon the cargoes for freight, advance charges on goods, extra compensation, demurrage, forwarding charges, general average claims, and for any liability incurred by the Carrier in respect of the goods (not required under the bills of lading to be borne by the Carrier).

20. *Jason Clause.* The bills of lading used by the Charterer shall contain a "Jason" clause substantially as follows:

> "In the event of accident, danger, damage, or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the carrier is not responsible by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the salving ship or ships belong to strangers."

The Owner shall have a lien upon all cargoes and all subfreights for any amounts due under this Charter.

401 21. *Both-to-Blame Collision Clause.* All bills of lading shall include the Both-to-Blame Collision Clause reading:

> "If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or

the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier."

22. *General and Particular Average.* Bills of lading shall contain a general average clause, substantially as follows (or such other general average clause as may be agreed upon by the Owner and the Charterer):

"General average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment, disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods.

"Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery. Such deposit shall, at the option of the carrier, be payable in United States money, and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the general average and refunds or credit balances, if any, shall be paid in United States money."

The Charterer agrees to take proper security for the cargo's proportion of general average; to assert liens; to appoint from the list of adjusters approved by the Owner an adjuster to adjust both general average and particular average losses; to assist the adjuster in preparing the average statement, and to take all other possible
402 measures to protect the interest of the vessels and Owner.

23. *Salvage.* Earned salvage shall be prorated—25 per cent to the Owner and 75 per cent to the Charterer, after deducting Owner's and Charterer's expenses and crew's proportion (Charterer's net share to be accounted for as voyage revenue). However, hire of the vessel shall not be considered an item of the Charterer's expenses hereunder. Settlement of claims for salvage shall be subject to the approval of both Owner and Charterer. The amount of awards for vessels owned or controlled by the Owner, their cargoes and freight monies, shall be determined by Owner.

24. *Libels.* Neither the Charterer nor the Master of the vessel nor any other person shall have the right, power, or authority to create, incur, or permit to be placed upon such vessels chartered to the said Charterer any liens whatsoever other than for crew's wages or salvage. The Charterer agrees to carry a properly certified copy of this Agreement with the ship's papers on board each vessel, and agrees to exhibit the same to any person having business with each vessel, and agrees also to exhibit the same to any representative of the Owner on demand.

The Charterer agrees to notify any person furnishing repairs, supplies, towage, or other necessaries to each vessel that neither the Charterer nor the Master has any right to create, incur, or permit to be imposed upon such vessel any liens whatsoever, except for crew's wages and salvage. Such notice as far as may be practicable shall be in writing. The Charterer further agrees to fasten in each vessel in a conspicuous place, and to maintain during the charter period, a notice reading as follows:

> "This vessel is the property of the United States of America. It is under charter to Isthmian Steamship Company, and, by the terms of the charter party, neither the Charterer nor the Master has any right, power, or authority to create, incur, or permit to be imposed upon the vessel any lien whatsoever, except for crew's wages and salvage."

The Charterer shall indemnify and hold harmless the Owner against any liens of whatsoever nature upon the vessels and against any claims against the Owner arising out of the operation of said Line by the Charterer, or out of any act or neglect of the Charterer, in relation to the vessels, or Line or the operation thereof, except in so
403 far as such liens or claims arise out of any matter covered by the insurance procured and in force, as provided herein. If a libel should be filed against any vessel, or if any vessel is otherwise levied against or taken into custody by virtue of legal proceedings in any court because of any such liens or claims, the Charterer shall at its own expense within fifteen (15) days thereof, cause such vessel to be released and the lien to be discharged.

25. *No Transfer or Assignment.* Without the Consent of the Owner, the Charterer shall not sell, transfer, or assign this Agreement or any interest therein, or make any arrangement whereby the maintenance, management, or operation of the vessel, is to be perfomed by any other person.

26. *Services Rendered the Vessels.* The Charterer if and when requested by the Owner shall file with the Owner rates and schdules covering any services rendered the vessels by any individual, firm or corporation.

F. Accounting: Definitions

27. *Accounting, Reports, and Supervision.* The Charterer shall keep its books, records, and accounts relating to the maintenance, operation and services of the vessel under this Agreement in accordance with the applicable provisions of General Orders Nos. 12, 22 and 31 of the Owner, and agrees for itself and for every affiliate, domestic agent, subsidiary or holding company connected with or directly or indirectly controlled by the Charterer and performing any services or having any transactions with the Charterer in connection with the operation of said vessels under the charter, that the Owner shall have the rights and the Charterer and said related companies shall have the duties described in Clauses 2 and 3 of Section 801 of the Merchant Marine Act, 1936, as amended.

28. *Preliminary Accounting.* The Charterer shall, within ninety days after the completion of the last voyage made pursuant to the provisions of this Charter Party Agreement, render an intermediate accounting as to all transactions had hereunder. Such accounting may include reserves for un-

known contingent, or disputed items, if any, in
404 amounts deemed reasonable by the Owner. Additional charter hire shall be paid by the Charterer and adjustment of basic charter hire shall be made by the Owner on the basis of such intermediate accounting, subject to adjustment upon final audit; Provided, however, that the sureties on the Charterer's bond (and the bond shall so provide) shall remain liable for any underpayment by the Charterer or any overpayment by the Owner made in connection with such preliminary accounting.

29. *Definitions.* Unless the context hereof otherwise requires, the terms used herein shall have the meaning as the same or equivalent terms employed in General Orders 12, 22, and 31 of the Owner.

G. Termination of Agreement

30. *Events of Default.* The following shall constitute events of default under this agreement:

(a) The failure of the Charterer to pay the charter hire on the Vessels as and when the same shall become due under the terms of this Agreement.

(b) The failure of the Charterer to operate the Vessels as required by Article 5 or the operation of the Vessels on some other route without the prior written approval of the Owner.

(c) Any material misrepresentation by the Charterer in connection with this Agreement whether before or after execution hereof and whether made in an application, report or otherwise, or any willful failure by the Charterer to disclose information necessary to cause any material representation by it not to be misleading.

(d) The occurrence of any event causing the Charterer to be ineligible for charter of the Owner's Vessels.

(e) A voluntary sale by the Charterer of this Agreement or any interest therein, or an assignment, transfer, agreement or arrangement whereby the maintenance, management or operation of the above described service, route, Line or Vessels shall pass out of the direct control of the Charterer without the consent of the Owner.

(f) The filing of a petition in bankruptcy by the Charterer, or the entry of an order, upon petition against the Charterer, adjudicating the Charterer a bankrupt, or the making of a general assignment for

the benefit of creditors, or the Charterer losing its charter by forfeiture or otherwise, or the appointment of a receiver or receivers of any kind whatsoever, whether appointed or not in Admiralty, Bankruptcy, Common Law or Equity proceedings, and whether temporary or permanent, for the property of the Charterer, or the filing of a petition by the Charterer for reorganization under the Bankruptcy Act, or the filing of such a petition by creditors and the same approved
405 by the Court, or the approval of the court of a reorganization of the Charterer under said Act, whether proposed by a creditor, a stockholder or any other person whomsoever.

(g) Any breach by the Charterer of its obligations under this Agreement or any agreement executed in connection therewith, or any ship mortgage given to or construction agreement made with the United States.

(h) Failure by the Charterer to comply with any applicable provisions of the Merchant Marine Act, 1936, as amended, or of any law relating to the operation of the Vessels.

31. *Termination upon Default.*

(a) The Owner may terminate this Agreement in whole or in part without notice to the Charterer in case any event of default specified in paragraphs (a), (b), (c), (d), (e), or (f) of the preceding Article 30 shall occur or if any other default specified in paragraphs (g) or (h) of said Article shall occur and shall continue for a period of 30 days after notice thereof has been mailed or telegraphed by the Owner to the Charterer.

(b) Upon termination, the Owner may, at its option, retake the Vessels wherever the same may be found, whether upon the high seas or in any port, harbor, or other place, without prior demand and without legal process and for that purpose may enter upon any dock, pier, or other premises where the Vessels may be and may take possession thereof, or may require the Charterer to redeliver such Vessels in accordance with the terms of this Agreement immediately upon the receipt of a notice demanding such redelivery.

(c) The rights conferred upon the Owner by this Article are cumulative and in addition to any other rights which it may have at law or in equity or by virtue of the terms of this Agreement.

32. *Termination in National Emergency.* Whenever the President shall proclaim that the security of the national defense makes it advisable, or during any national emergency declared by proclamation of the President, the Owner may terminate this Agreement, without cost to the United States, upon such notice to the Charterer as the President may determine.

33. *Optional Termination.* The Owner or Charterer may, upon giving notice to the other, terminate this Agreement, effective as to each vessel upon the completion of her
406 voyage; but such termination shall not, unless mutually agreed upon, be effective with respect to any vessel which does not complete discharging at its last United States port within less than 30 days after the giving of such notice.

H. Miscellaneous Clauses

34. *Officials not to Benefit nor to be Employed.* No member of or delegate to the Congress, nor Resident Commissioner, shall be admitted to any share or part of this Agreement or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909 (35 Stat. 1109).

IN WITNESS WHEREOF, the parties hereto have executed this Charter Party Agreement in quintuplicate as of the day and year first above written.

UNITED STATES MARITIME COMMISSION,

By G. S. LAND,
Chairman.

ATTEST:
W. C. PEET,
Secretary.

ISTHMIAN STEAMSHIP COMPANY,

By WALTER M. WELLS,
Vice President.

ATTEST:
N. P. HUFF,
Secretary.

Approved as to form:

CARL F. FARBACH,
General Counsel,
U. S. Maritime Commission.

EXHIBIT 81

UNITED STATES MARITIME COMMISSION

Washington

May 26th, 1941

States Steamship Company
810 Porter Building
Portland, Oregon

Gentlemen:

For your information and records, we are transmitting to you herewith a certified copy of *Order No. CH–565*, approving the charter to an alien of the *S. S. Vermont*, as set forth therein.

A copy of this Order has also been forwarded to the Collector of Customs at Portland, Oregon.

Very truly yours,

G. H. Helmbold,
(Signed) G. H. HELMBOLD,
Director, Operations and Traffic.

Attachment

UNITED STATES MARITIME COMMISSION

Washington

ORDER No. CH–565

Approving the Charter to an Alien of the *S. S. Vermont*

WHEREAS an application has been made on behalf of States Steamship Company for the approval required by Section 9 of the Shipping Act 1916, as amended (46 U. S. C. 808) of the charter of the *S. S. Vermont*, Official No. 217727, to the British Ministry of War Transport, for one voyage from a United States North Atlantic port or ports to Suez, or to a port or ports in the Capetown/Karachi range, sailing on or about May 27, 1941;

IT IS ORDERED, this 23rd day of May 1941, that the approval of the Maritime Commission as required by Section 9 of the Shipping Act 1916, as amended (46 U. S. C. 808) of the charter of the *S. S. Vermont*, Official No. 217727, as above set forth, be, and it is hereby granted upon the condition that said vessel may not be subchartered to aliens under this approval.

UNITED STATES MARITIME COMMISSION.
(Signed) W. C. PEET, Jr.,
Secretary.

A true copy:
W. C. PEET, Jr.,
Secretary.

EXHIBIT 82

UNITED STATES MARITIME COMMISSION

Washington

July 12, 1941

AIRMAIL

States Steamship Company
Porter Building
Portland, Oregon

Gentlemen:

The *S. S. Vermont*, on completion of discharge of cargo at Red Sea ports, has been approved for a voyage with salt from Aden to Calcutta. On completion of discharge at Calcutta, this vessel is to load from Calcutta to United States North Atlantic ports taking the following cargo:

3,000 tons manganese ore
1,000 tons mica-shellac
500 tons kyanite
2,500 tons burlap

It is requested that the homeward cargo of the vessel be arranged through the American Export Lines, Inc.

Please confirm promptly that satisfactory agreement has been concluded between your good selves and the American Export Lines, Inc., as to agency arrangements, etc., for this homeward voyage and at the same time give us the closest possible estimate of the expected readiness date of the vessel at United States North Atlantic ports for next employment.

Very truly yours,

(Signed) A. E. KING,
Asst. Director, Emergency Shipping.

EXHIBIT 83

UNITED STATES MARITIME COMMISSION

Washington

July 28, 1941

States Steamship Company
810 Porter Building
Portland, Oregon

Gentlemen:

Confirming our telegram of July 24, 1941, we are transmitting to you herewith a certified copy of *Order No. CH–648*,

approving the charter to an alien of the *S. S. Vermont*, as set forth therein.

A copy of this Order has also been forwarded to the Collector of Customs at Portland, Oregon.

Very truly yours,

G. H. Helmbold,
(Signed) G. H. HELMBOLD,
Director, Operations and Traffic.

Attachment

UNITED STATES MARITIME COMMISSION

Washington

ORDER No. CH–648

Approving the Charter to an Alien of the *S. S. Vermont*

WHEREAS an application has been filed on behalf of the States Steamship Company for the approval required by Sections 9 and 37 of the Shipping Act 1916, as amended (46 U. S. C. 808 and 835) of the charter of the *S. S. Vermont*, Official No. 217727, to Eduljee Dinshaw, Karachi, India, for a full cargo of salt from Karachi to Calcutta, loading August, 1941;

IT IS ORDERED, this 24th day of July, 1941, that the approval of the Maritime Commission, required by Sections 9 and 37 of the Shipping Act 1916, as amended (46 U. S. C. 808 and 835) of the charter of the *S. S. Vermont*, Official No. 217727, as above set forth, be, and it is hereby granted upon the condition that said vessel may not be subchartered to aliens under this approval except as may be permitted by General Order No. 34 Revised.

UNITED STATES MARITIME COMMISSION,
(Signed) W. C. PEET, Jr.,
Secretary.

A true copy:
W. C. PEET, Jr.,
Secretary.

407 EXHIBIT A

UNITED STATES MARITIME COMMISSION
New York, N. Y.

October 15th, 1941

Mr. R. A. Nicol
States Steamship Company
17 Battery Place
New York City

Re: North Atlantic-Red Sea Demurrage

Dear Mr. Nicol:

Vessels operating under Red Sea charter party may have exceeded allowable lay days before completion of discharge at final port, and demurrage accordingly will be due.

Forms for the establishing of lay days used will shortly be sent your loading agent. Thereafter, and based upon that report, you will bill for any demurrage due.

When such bills are submitted by you, it will be necessary that they be accompanied by complete extracts of voyage log in support of the time factors claimed.

Several of the vessels in this service either have completed, or are about to complete, a voyage under the Red Sea charter party and you will no doubt wish to secure this information before the vessels sail again on their further employment.

Very truly yours,

GRANVILLE CONWAY,
District Manager,
North Atlantic District.

408 EXHIBIT B

UNITED STATES MARITIME COMMISSION
New York, N. Y.

July 9th, 1941

States Steamship Company
17 Battery Place
New York, N. Y.

Attn.: Mr. R. A. Nicol

Gentlemen:

It is noted that in some instances, invoices covering Red Sea vessels have been made out to the British Ministry of War Transport instead of to the U. S. Maritime Commission.

In the future, it will be appreciated if you will have these invoices made out to the U. S. Maritime Commission.

Very truly yours,

GRANVILLE CONWAY,
District Manager,
North Atlantic District.

409 EXHIBIT C

UNITED STATES MARITIME COMMISSION
New York, N. Y.

August 22, 1941

Mr. R. A. Nicol, President
States Steamship Company
17 Battery Place
New York City

Re: North Atlantic-Red Sea

Dear Mr. Nicol:

Under date of June 21st we wrote you detailing the method of presenting documents in support of bill for charter hire for vessels in this service.

Those specifications remain unchanged with the exception of #2. This has to do with certified freight bill of which we asked you for 6 copies. It will now be necessary to supply an additional copy, and we would appreciate your including a total of 7 copies of the certified freight bill for each vessel.

We are notifying the British Ministry of War Transport of this requirement so that they will be prepared to certify this additional copy.

Very truly yours,

GRANVILLE CONWAY,
District Manager,
North Atlantic District.

410 EXHIBIT D

UNITED STATES MARITIME COMMISSION
Washington

August 29, 1941

States Steamship Company
17 Battery Place
New York, New York

Subject: *Red Sea Charter Conditions.*

Gentlemen:

The Maritime Commission has directed that effective September 15, 1941, and until further notice the following

changes are to be effective in the charter for vessels placed in this trade:

The rate will be sixty cents (60¢), United States Currency, net per cubic foot, on the bale cargo capacity.

Charterers will have the privilege, subject to Master's discretion, of loading deck cargo at their risk and expense without any additional payment for freight other than the 60¢ per bale foot for the under-deck cargo. Payment for deck cargo will be, therefore, eliminated.

The amount of refund by charterers to owners for discharge at alternate ports shall be as follows:

(a) *Port or ports in Capetown-Mombasa range.*
Twenty cents (20¢) per cubic foot bale space on which original freight was paid.

(b) *Port or ports in Persian Gulf.*
Ten cents (10¢) per cubic foot bale space on which original freight was paid.

(c) *Port or ports in Karachi-Bombay range.*
Fifteen cents (15¢) per cubic foot bale space on which original freight was paid.

Demurrage will be fixed on the following scale.

9000 and over	$1800.00
7000 to 8999	1650.00
6000 to 6999	1500.00
Under 6000	1250.00

Otherwise the conditions of the present agreement will remain unaltered.

Very truly yours,

G. H. Helmbold,
Director, Operations and Traffic.

411 Exhibit E

August 29, 1941.

Mr. John S. Maclay
British Merchant Shipping Mission
Box 680, Benjamin Franklin Station
Washington, D. C.

Subject: *Red Sea Charter Conditions.*

Dear Mr. Maclay:

For your information the Maritime Commission has directed that effective September 15, 1941, and until further notice the following changes are to be effective in the charter for vessels placed in this trade:

The rate will be sixty (60¢), United States Currency, net per cubic foot, on the bale cargo capacity.

Charterers will have the privilege, subject to Master's discretion, of loading deck cargo at their risk and expense without any additional payment for freight other than the 60¢ per bale foot for the under-deck cargo. Payment for deck cargo will be, therefore, eliminated.

The amount of refund by charterers to owners for discharge at alternate ports shall be as follows:

(a) *Port or ports in Capetown-Mombasa range.* Twenty cents (20¢) per cubic foot bale space on which original freight was paid.

(b) *Port or ports in Persian Gulf.* Ten cents (10¢) per cubic foot bale space on which original freight was paid.

(c) *Ports or ports in Karachi-Bombay range.* Fifteen cents (15¢) per cubic foot bale space on which original freight was paid.

Demurrage will be fixed on the following scale:

9000 and over	$1800.00
7000 to 8999	1650.00
6000 to 6999	1500.00
Under 6000	1250.00

Otherwise the conditions of the present agreement will remain unaltered.

Very truly yours,

(Signed) G. H. HELMBOLD,
Director, Operations and Traffic.

412 EXHIBIT F

September 12, 1941.

Mr. John S. Maclay
British Merchant Shipping Mission
Box 680, Benjamin Franklin Station
Washington, D. C.

Subject: Red Sea Charter Conditions

Dear Mr. Maclay:

Referring to our letter of August 29, 1941, setting forth the changes in the charter for vessels in the Red Sea Service, several inquiries have been received by the Commission as to whether new rates are effective on charters signed prior to September 15, 1941.

In order to clarify this, you are advised that the new rates are effective on all vessels which commence loading on and after September 15, 1941, irrespective of the date of signing charter party.

Very truly yours,

(Signed) G. H. HELMBOLD,
Director, Operations and Traffic.

413 EXHIBIT G

[For Identification]

No. 1125

UNITED STATES OF AMERICA

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify that Miss Cornelia Julia Polak, whose name is subscribed to the document hereunto annexed, was at the time of signing the same British Consul at Washington, D. C.*

In testimony whereof, I, JAMES E. WEBB, Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this ninth day of March, 1951.

JAMES E. WEBB,
Acting Secretary of State.

By M. P. CHAUVIN,
[SEAL.] *Authentication Officer, Department of State.*

414 I, Frederick Victor Cross, an Assistant Secretary of the Ministry of Transport, HEREBY CERTIFY that the document hereto attached and marked "A" is a STATEMENT based on information extracted from documents preserved in the archives of the Ministry of Transport (formerly the Ministry of War Transport); AND THAT to the best of my knowledge and belief, it is a TRUE STATEMENT.

F. V. CROSS.

18th January, 1951.

Ministry of Transport,
Berkeley Square House,
London, W. 1.

* For the contents of the annexed document the department assumes no responsibility.

I, Henry Frank Hancock, Assistant Shipping Attaché at the British Embassy at Washington D. C., do hereby certify that the signature of Frederick Victor Cross which appears above is in fact his signature, that he is an Assistant Secretary of the Ministry of Transport, London, and that the preparation of the document attached to his certificate has been made in performance of his official duties as an Assistant Secretary of the Ministry of Transport.

I further certify that the seal uniting the pages of this document is the seal of the Ministry of Transport.

Dated this ninth day of March, 1951.

H. F. HANCOCK,
Assistant Shipping Attaché.

I, Cornelia Julia Polak, His Majesty's Consul at Washington, D. C., hereby certify that the signature "H. F. Hancock" which appears above is that of Mr. Henry Frank Hancock, Assistant Shipping Attaché at His Majesty's Embassy at Washington, D. C.

Done at the British Embassy (Consular Section) Washington (District of Columbia) this ninth day of March, 1951.

CORNELIA J. POLAK,
H. B. M. Consul.

[SEAL.]

415 *Statement by His Majesty's Government as to the circumstances under which certain American vessels were made available for the carriage of war supplies to the Red Sea Area in 1941.*

1. His Majesty's Government, early in 1941, requested the United States Government, and the United States Government agreed, to furnish certain shipping tonnage necessary to the prosecution of the War in which His Majesty's Government was then engaged. The United States Government agreed to furnish such tonnage at its own expense and no arrangement for reimbursement by His Majesty's Government has been, or will be, made.

2. Such tonnage was, during 1941 and 1942, furnished by means of certain charters with various shipowners covering voyages to Red Sea ports, commonly referred to as "Red Sea Charters", a list of which is attached hereto.

3. His Majesty's Government took no part in the negotiations with the shipowners leading up to the execution of said charters.

4. At the request of the United States Government, the British Ministry of War Transport, a representative of His

Majesty's Government, signed the charters as negotiated and drafted by the United States Maritime Commission and the shipowners. The signature by the representative of His Majesty's Government was requested by the United States Government on the ground that it was necessary to meet *formal* requirements. No charters were in fact executed by the representative of His Majesty's Government until after the receipt of a letter dated June 9, 1941, from the Office for Emergency Management to the effect that the obligations of the charters would be met by the United States Maritime Commission on behalf of the United States Government.

5. When the representative of His Majesty's Government signed the above-mentioned charters, it was understood that His Majesty's Government in signing said charters were agents only and that the principal and real party in interest was the United States Government as represented by the United States Maritime Commission.

6. The bills submitted by the shipowners under said charters to His Majesty's Government were forwarded to the United States Maritime Commission for payment. In forwarding such bills, the representatives of His Majesty's Government certified merely that the services specified had been performed.

416 Tonnage on the following vessels was furnished his Majesty's Government under Lend-Lease Requisitions as indicated:

Lend-Lease Requisitions, Nos. 1503 and 1503A, dated May 15, 1941

Vessel	
Antinous	West Zeda
Knoxville City	President Buchanan
Vermont	West Nohno
Aquarius	Wind Rush
Effingham	Bienville
West Hardaway	Extavia
West Jaffrey	Cranford
Montanan	Pan Kraft

Lend-Lease Requisition No. 2115, dated May 28, 1941

Kenmar	Edwin Christenson
Potlach	West Durfee
Losmar	Flomar
Alabaman	American
Texas	William L. Thompson
Iberville	Illinois
Walter A. Luckenbach	Lewis Luckenbach
Columbian	President Fillmore
West Ira	Excello
Mary Luckenbach	Jean La Fitte
Marymar	Andrew Jackson
Robert Luckenbach	Excellency
Steel Inventor	

Lend-Lease Requisition No. 2731, dated June 18, 1941

W. R. Keever	Winona
Nordal	Heffron
West Kiska	Hawaiian
Arkansan	Oremar
Excellency	Kansan
Liberty Glo	Exilona
Steel Seafarer	Susan Luckenbach
Alaskan	Iowan
Paul Luckenbach	American Robin
Pennsylvania	Maine
Alamar	

417 *Lend-Lease Requisition No. 3599*, dated July 24, 1941

Vessel	
Lillian Luckenbach	Mauna Kea
Jefferson Myers	Pennsylvanian
Honomu	

Lend-Lease Requisition No. 3750, dated July 30, 1941

Ipswich	Exton
Exford	Hollywood

Lend-Lease Requisition No. 4624, dated August 22, 1941

Johnstown	Steel Worker
Kentucky	

Lend-Lease Requisition No. 5622, dated September 17, 1941

Buchanan	Fairfield City

Lend-Lease Requisition No. 6333, dated October 14, 1941

Potlach	Mary Luckenbach
Pres. Buchanan	Columbian
Gateway City	Kahuku
Chickasaw City	

Lend-Lease Requisition No. 6615, dated October 24, 1941

La Salle

418 EXHIBIT H

[For Identification]

No. 1126

United States of America

Department of State

To all to whom these presents shall come, Greeting:

I certify that the documents hereunto annexed are true copies from the files of this Department.

In testimony whereof, I, James E. Webb, Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this ninth day of March, 1951.

JAMES E. WEBB,
Acting Secretary of State.

[SEAL.]

By M. P. CHAUVIN,
Authentication Officer, Department of State.

419 DEPARTMENT OF JUSTICE

Washington, D. C.

NAC:FNC:leb
Tax Ct. No. 870-R

November 9, 1950

Department of State
Washington, D. C.

Attn: J. E. Saugstad, Chief Shipping Policy Staff

Re: California Eastern Line, Inc. v. Chairman of the United States Maritime Commission; Tax Ct. No. 870-R

Gentlemen:

In the above-entitled suit, California Eastern Line. Inc., a Delaware corporation, seeks a redetermination of its

excessive profits arising out of the charter of the Vessel SS Vermont to the Red Sea area. This suit will be the lead case in a series of renegotiation suits involving the charter of various American vessels to the Red Sea area in 1941.

It is vitally important in the defense of this case and other cases involving the chartering of American vessels to the Red Sea area, that the Department have an official statement from the British Government concerning its view as to the relationship between the United States Government and the British Government at the time the charters were executed, the circumstances surrounding the execution of such charters and the agreements which were made for the payment or reimbursement of the charter hire.

It is anticipated that the above-entitled case will be tried during the early part of January, 1951.

It would be appreciated if you would request the British Embassy here in Washington, D. C., to obtain from the appropriate agency of the British Government an official statement relative to the facts set forth above.

Sincerely yours,

For the Attorney General,

NEWELL A. CLAPP,
Acting Assistant Attorney General.

420 The Secretary of State presents his compliments to His Excellency the British Ambassador and has the honor (1) to enclose a copy of a self-explanatory letter dated November 9, 1950 from the Department of Justice concerning aspects of this Government's defense to a suit entitled *California Eastern Line, Inc.* v. *Chairman of the United States Maritime Commission; Tax Ct. No. 870-R* and, (2) to request that an official statement, relative to the facts set out in the enclosure, be obtained from the appropriate agency of the British Government for the use of the Government of the United States.

Enclosure: Letter from Department of Justice, November 9, 1950 (Copy)

Department of State, Washington, November 17, 1950.

421 *No. 46*
Ref.: 7586/2/51

His Majesty's Ambassador for the United Kingdom presents his compliments to the Secretary of State and, in

reference to his note dated November 17, 1950, has the honour to enclose, together with a certificate authenticating it under the official seal of His Majesty's Ministry of Transport, a statement setting out the circumstances in which certain American vessels were made available for the carriage of war supplies to the Red Sea area between May and October, 1941.

2. On the principle that His Majesty's Government should stand aloof and that basic information should be made available to both parties in the suit for which the statement is required, His Majesty's Ambassador requests that a copy of the statement be made available, *if so requested,* to the California Eastern Line, Inc., who are the appellants in the case.

BRITISH EMBASSY,
WASHINGTON, D. C.,
24th January, 1951.

422 Address Official Communications to the Secretary of State

Washington 25, D. C.

DEPARTMENT OF STATE
WASHINGTON

In reply refer to L:L/E.

February 6, 1951.

The Secretary of State transmits herewith to the Attorney General, in connection with his Department's letter NAC:FNC:leb, Tax Ct. No. 870-R, dated November 9, 1950, concerning California Eastern Line, Inc. v. Chairman of the United States Maritime Commission, a copy of a note No. 46 of January 24, 1951, with enclosure from the British Embassy, Washington, D. C. The enclosure consists of a statement of the circumstances under which certain American vessels were made available for the carriage of War supplies to the Red Sea area in 1941, and a certificate dated January 18, 1951 from the British Ministry of Transport authenticating the aforesaid statement.

Enclosures: Copy of note No. 46 of January 24, 1951, with enclosure, from the British Embassy.

423 [Caption]

ORDER

This proceeding came on for hearing on the merits March 16, 1951 at Washington, D. C. Respondent offered in evidence exhibits for identification D, E, F, G and H, to which counsel for petitioner made objection. At that time the Court reserved ruling on the admissibility of said exhibits. There have also been offered in evidence by petitioner, without objection by respondent, petitioner's exhibits 81, 82, and 83, upon which the Court has not yet ruled. After due consideration, it is

ORDERED, That petitioner's objections to exhibits D, E, and F are overruled, and exhibits D, E, and F are admitted in evidence; and

ORDERED FURTHER, That petitioner's objections to exhibits G and H are sustained, and exhibits G and H are not admitted in evidence; and

ORDERED FURTHER, That exhibits 81, 82, and 83 are admitted in evidence.

(S.) ARNOLD RAUM,
Judge.

[SEAL.]

Dated: Washington, D. C., February 1, 1952.

424 [Caption]

EXCEPTION

Comes now respondent by his attorney and excepts to that portion of the Court's order dated February 1, 1952 in the above-entitled proceeding which sustained petitioner's objections to the admission in evidence of respondent's exhibits G and H for identification.

Respectfully submitted,

(S.) HOLMES BALDRIDGE,
Assistant Attorney General.

(S.) JAMES H. PRENTICE,
Attorney,
Department of Justice.

425 17 T. C. No. 159

THE TAX COURT OF THE UNITED STATES

Docket No. 870-R

CALIFORNIA EASTERN LINE, INC., PETITIONER

v.

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, RESPONDENT

Promulgated February 15, 1952.

Where the British Ministry of War Transport entered into a space charter for the hire of petitioner's steamship, and the charter was financed with Lend-Lease funds provided through the United States Maritime Commission, which also cooperated in negotiating the charter and supervising aspects of performance under it, *Held*, the charter was not a contract with the Maritime Commission, within Section 403(c)(1) of the Renegotiation Act, and therefore was not renegotiable.

Harold B. Finn, Esq., and *Robert E. Kline, Jr., Esq.*, for the petitioner.

Frederick N. Curley, Esq., and *James H. Prentice, Esq.*, for the respondent.

426 Respondent determined by unilateral order, under the Renegotiation Act, as originally enacted in 1942,[1] that profits realized by petitioner on a war contract were excessive to the extent of $164,000. Petitioner brought this proceeding to redetermine its excessive profits on that contract. On its motion for a severance of issues, the trial was limited to whether petitioner's profits under that contract were subject to renegotiation. Thereafter, the parties stipulated that there are now presented for decision the following questions under the provisions of the Renegotiation Act: (1) Whether the war contract was a contract or subcontract with a "Department" named in that

[1] The statutory provisions involved were enacted as Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (56 Stat. 245). In making amendments to the foregoing provisions, Section 701 of the Revenue Act of 1943 (58 Stat. 78) retroactively provided that Section 403 of the foregoing 1942 legislation may be cited as the "Renegotiation Act."

Act. (2) Whether "final payment pursuant to such contract or subcontract" had been made prior to April 28, 1942. (3) Whether renegotiation was commenced more than one year after the close of petitioner's fiscal year in which "completion" of that contract had occurred. Determination of any of these questions in petitioner's favor obviates consideration of those remaining, and requires decision for petitioner.

FINDINGS OF FACT

The facts stipulated by the parties are found as stipulated, and the written stipulation and accompanying exhibits are incorporated herein by reference.

427 California Eastern Line, Inc., is a corporation organized under the laws of Delaware, and has its principal office at Vancouver, Washington. Effective March 16, 1942, it acquired all the assets and assumed all the liabilities of an Oregon corporation of the same name. The Oregon corporation prior to that date, and the Delaware corporation thereafter, will be referred to as the "petitioner". Petitioner owned a steamship named the "Vermont", which was operated in the United States intercoastal trade.

At all times material hereto, petitioner kept its books and filed its Federal income tax returns on the accrual basis and for a calendar year; except that for 1942 the bookkeeping and tax period of the Oregon corporation ran from January 1 to March 16, while the Delaware corporation accounted for the remainder of the calendar year.

The national defense program in 1941 required mobilization of American facilities for ocean transportation. President Roosevelt communicated with Admiral Emory S. Land, Chairman of the United States Maritime Commission (hereinafter referred to as the "Commission"), to assure satisfaction of ocean shipping needs, and on February 25, 1941, the Commission created a Division of Emergency Shipping to handle emergency transportation problems and to supervise sales, charters, transfers, requisitions, reallocations and reassignments of all vessel tonnage in connection with emergency transportation. In April 1941 the President directed Admiral Land to secure at least 2,000,000 tons of merchant shipping in the service of the defense effort. On April 10, 1941, the President issued a proclamation modifying the existing ban on American vessels against
428 sailing in certain combat areas, and made it lawful for American vessels to proceed through the Gulf of Aden into the Red Sea as far as Port Said.

At that time, the British Purchasing Commission had

acquired war equipment and supplies in the United States, and shipping facilities were needed to transport that portion of the equipment and supplies to North Africa as might be assigned to that theatre of operations. In this connection, the British Government sought shipping facilities under the American Lend-Lease program, and for this purpose a "Requisition For Defense Articles", dated May 15, 1941, was submitted to American authorities by the British Government.

With knowledge of the President's directives, Commission officials held informal discussions with certain American shipowners during April 1941. On April 25, 1941, a meeting was called and attended by Commission officials to point out to these shipowners or their representatives that vessels were needed to transport cargo to the Red Sea area for the British, and to work out an arrangement with the shipowners by which to secure the tonnage needed for this operation. Petitioner was represented at this meeting. Thereafter, to secure the necessary tonnage and to fix the terms under which the supplies and equipment were to be transported in this operation, further conferences were held, between Commission officials and shipowners or representatives of American vessels, in 1941 on May 3, 7, 9, 13, 16 and 21. Petitioner was also represented at these conferences.

In its discussions and dealings with the Commission, petitioner was represented by C. E. Dant (hereinafter re-
429 ferred to as "Dant"), of the States Steamship Company, and by R. A. Nicol (hereinafter referred to as "Nicol"), president of R. A. Nicol & Co.

On or about April 26, 1941, in a letter to Nicol, the Commission's Director of Emergency Shipping confirmed an understanding with Dant and Nicol reached on April 25, 1941, for the latter to make available the Vermont and other ships in response to the Commission's request for allocation of vessels to the "North Atlantic/Red Sea service". Thereafter Dant and Nicol, on the one hand, and officials of the Commission, on the other, communicated with each other by letter and telegram concerning conditions on which the "Vermont" was to be provided for the Red Sea operation.

Commission officials and the shipowners or their representatives negotiated the terms under which the Vermont and the other ships involved were to be hired or "chartered" for the Red Sea operation, including the charter rates according to which the shipowners were to be paid. Petitioner,

through Dant and Nicol, participated in these negotiations with the Commission. Agreement was reached between the Commission officials and the owners on the terms of a
430 "space charter"[2] to cover the Red Sea operation, and a draft of the charter was then prepared and submitted to the Commission for its approval. The following explanation, given to the Commission in a memorandum dated May 21, 1941, from its Director of Operations and Traffic, describes the arrangements made between Commission officials and the shipowners for the Red Sea operation:

> Pursuant to the direction of President Roosevelt to the Chairman on April 30, 1941, the Division of Emergency Shipping has thus far arranged for the employment of about 43 United States flag vessels in service to the Red Sea. It is expected that approximately 12 or 15 vessels will sail during the present month and about 25 during June.
>
> The vessels in question are owned by a number of companies normally engaged in trade elsewhere than to the Red Sea. In order to concentrate the operations in as few hands as possible, we have arranged for the vessels to be loaded by the berth operators—in this case, American Export Lines and Isthmian Steamship Lines. The vessels will be spotted and loaded under the supervision of one or the other of these companies who will also book any commercial cargo for which space may be available.
>
> Our plans call for the execution of a space charter between the vessel owners and the British Ministry of War Transport. A copy of the proposed form of charter is attached. It provides that the owner of the vessel will receive 75¢ per cubic foot on the total bale cargo capacity of his vessel and, if any cargo is carried on deck, 60¢ per cubic foot on actual measurement of such cargo. Out of this, the owner must pay all expenses of the voyage (except cargo expense for loading; dis-

[2] The "space charter" was explained as follows in a letter from Admiral Land to Congressman Edward J. Hart: "Under the usual space charter arrangement, the shipper [the charterer] paid on the basis of the total cubic content of the ship, delivering to the vessel whatever he wanted to go, and the vessel owner took care of all expenses of loading and discharging". Admiral Land added that, in order to get a lower charter rate, in this case the cost of loading and discharging the cargo was assumed by the charterer.

charging expense abroad being assumed by the British Government), including an agency fee to the berth operator of ¼¢ per bale cubic foot, not to exceed $1,000. The berth operator will book such commercial cargo as may be available and necessary to fill out the space not used by the British Ministry of War Transport, and, on this, he receives a commission of 5% which is, of course, deductible from the revenue. For example, on a vessel with 400,000 cubic feet of bale cargo space and no cargo carried on deck, the vessel owner will be paid $300,000 for the voyage to Suez; the agent will receive $1,000 as an agency fee and, if commercial cargo with a total revenue of, say, $75,000 is booked by him, he will also obtain $3,750 in commission.

The British Ministry of War Transport will secure reimbursement for the amounts paid to the vessel owner and for the amounts paid for loading British cargo on the vessel (which is not included in the above-mentioned charter rate) from Lease-Lend funds. In the example cited above, they will secure $300,000 plus the loading expense of British Ministry cargo less the net revenue secured from commercial cargo after deduction of cargo handling expense, agents commissions, etc.

431

The loading operations of the United States flag vessels involved in this program will take place at New York and Philadelphia. At New York, the American Export Lines and Isthmian Steamship Lines have arranged to lease adjoining piers at Staten Island under a guarantee of rental by the British Ministry of War Transport. * * *

While all of these vessels are expected to clear for Suez, conditions at that port may render advisable discharge at some other port in the range between Capetown and Bombay and the charter makes provision for this as well as for rate adjustment in such an eventuality. Upon completion of discharge of the outward cargo, the charter terminates and the vessel is open for other employment homeward to the best advantage, depending upon our particular needs for transportation at that time.

* * * * * * * * *

At its meeting of May 23, 1941, the Commission approved this memorandum with two exceptions: (1) That the pro-

posed charter be made "subject to modification in accordance with the form of charter ultimately approved by Commission"; (2) That payment under the charter be made directly by the Commission to the owners from the allocated Lend-Lease funds; and that the berth operator should remit direct to the Commission, as a credit to Lend-Lease funds, "freight revenue collections on commercial cargoes less commissions and cargo loading expenses". Thereafter, at its meeting of May 29, 1941, the Commission also made the proposed form subject to certain additional requirements: (1) The Commission prescribed the manner of ascertaining the cargo capacity of each ship. (2) It designated the formula for determining demurrage and adjustment in the freight charges. (3) It dealt with valuation for purposes of war risk insurance, as well as the minimum
432 amounts of war risk insurance to be provided on ships on which the Commission held mortgages. As modified and conditioned in all the foregoing respects, the Commission approved the proposed charter "for use by private owners of American-flag vessels in chartering their vessels to the British Ministry of War Transport, under arrangements heretofore made in cooperation with the Commission or which may hereafter be so made", and designated the officials authorized to approve in behalf of the Commission specific charters with particular shippers in the approved form.

This approval by the Commission of the form of charter was given, first, in the Commission's capacity as the government agency charged with mobilization and supervision of shipping resources, as the negotiator of the terms of the charters to be executed by the shipowners, and as the source from which funds were to be obtained for payment of the charter of the ships. Secondly, the Commission's approval was given in order to satisfy the requirements of Sections 9 and 37 of the Shipping Act of 1916, as amended (46 U. S. C. Secs. 808, 835), which, in the circumstances specified, required such approval where ships owned by citizens of the United States were chartered to non-citizens of the United States. Thirdly, some of the vessels involved were subject to mortgages held by the Commission, and approval of the Commission as mortgagee was required. Petitioner also needed Commission consent to a charter of the Vermont for the Red Sea operation because, on acquiring that ship, it had agreed with the Commission not to use the Vermont in foreign commerce for a ten-year period from July 21,

1937; that consent, in the form of a conditional waiver
433 of this prohibition, had been given earlier at a meeting of the Commission on May 6, 1941.

During the course of the negotiations between the Commission officials and the shipowners, it was understood by all the negotiating parties, including petitioner, that the British Government would probably be the charterer under the charter covering the Red Sea operation. During the period of these negotiations, there was communication between Commission officials and representatives of the British Government concerning matters affecting the Red Sea operation, and by May 15, 1941 the British Ministry of War Transport and the Maritime Commission had come to agree on details concerning use of the Vermont and other ships in the Red Sea operation. Neither the British Government nor any of its agencies or representatives, however, took part in the negotiations with the shipowners on the terms of the charter of the Vermont or the other ships for the Red Sea operation.

On May 29, 1941, the Vermont, having loaded the cargo which the British Ministry of War Transport furnished at the port of New York, sailed from that port and proceeded to Port Sudan, a port in the Red Sea range. Delivery of that cargo, as directed by agents of the British Government, was finished at Sudan on August 8, 1941. Thereafter the Vermont was worked homeward with commercial cargo for the account of the owners. The homeward journey was undertaken under the direction and with the approval of the Commission.

434 On May 28, 1941, a Commission official mailed Nicol a copy of a complete draft of the proposed charter. After the Commission's approval of the charter, the same official wrote Nicol about the conditions and modifications inserted by the Commission, and referred to the approved form as "the form of charter which we desire your Company to execute with the British Ministry of War Transport". Nicol was also informed by the official that "We desire this vessel [Vermont] consigned to the American Export Lines, Inc." Copies of the approved charter applicable to the Vermont were mailed to Nicol to be executed in behalf of petitioner; to be forwarded by him to the British Ministry of War Transport for execution in behalf of the British Government; and then to be returned to the Commission. This procedure was followed, and the charter for the Vermont (hereinafter also referred to as the "charter") was signed by Nicol in behalf of petitioner, and by

Sir T. A. Sparks in behalf of the British Ministry of War Transport, and thereafter it was signed by a Commission official to show the Commission's approval. These persons were authorized to sign for their respective principals. The Ministry of War Transport was an agency of the British Government.

While execution of the charter was taking place, Nicol raised a question as to the meaning of certain provisions of the charter. Nicol submitted his question to a Commission official, and the two of them reached an understanding as to the matter involved.

435 The charter was executed after the Vermont had already loaded its cargo at New York and started its voyage. Petitioner sent copies of the charter to the Ministry of War Transport on or about June 3, 1941; Sparks did not sign the charter until about June 10, 1941; and the charter was not returned to the Commission until about June 11, 1941. But by the time the Vermont had been loaded and set sail (May 29, 1941), the terms of the charter had been agreed upon, and the shipowners knew at that time that they and the Ministry of War Transport were to be the parties to the charter.

The charter embodied the provisions described in the memorandum to the Commission quoted above, considered at its meeting of May 23, 1941, except as modified in the manner hereinabove found. The charter stated that it was an agreement between "California Eastern Line, Inc. owners of the steamship Vermont * * * and British Ministry of War Transport Charterers". It specified the cargo space of the Vermont; described the ports at which the cargo was to be loaded and the area in which it was to be discharged; imposed on the charterer the expense of loading and discharging the cargo; and fixed the freight rates to be paid by the charterer, including those applicable in the event of alteration or interruption of the voyage. It contained numerous other provisions, dealing with the charges to be paid petitioner; the loading and unloading of the cargo; the rights and privileges reserved to the owners or the master of the ship; and the incorporation into the charter and bills of lading of clauses dealing with certain matters as war risks, damage and disaster. The charter, further, spe-

436 cifically made provision for certain powers in the Commission. Thus, it was provided that "Vessel to be berthed in United States ports or piers or terminals and to use facilities designated by the Charterer and approved by the authorized representative of the United States Mari-

time Commission". Provision was made for an adjustment in the freight charge "If by reason of changed conditions the Owners and Charterers agree, or in case of disagreement, the United States Maritime Commission determines, that the voyage shall not be prosecuted further or not completed * * * ". The charter concluded with the provision that "This charter not to become effective until approved by the United States Maritime Commission. If any dispute arises under this charter the same is to be settled by the United States Maritime Commission."

By letter of May 31, 1941, Nicol was informed by a Commission official that "The payment of the amounts due under the charter will be made as promptly as possible by the U.S. Maritime Commission from Lease-Lend funds. We are now endeavoring to perfect our procedure under the Lend-Lease Act, so as to insure prompt payment." Commission officials also instructed Nicol as to the procedure to be followed in order for petitioner to obtain payment. Among the documents required to be submitted was a "freight bill" which was to be "certified by an authorized representative of the British Ministry of War Transport in New York". Petitioner understood, during the negotiations on the terms of the charter and at the time it executed the charter, that payment under the charter was to be made from Lend-Lease funds provided by the United States.

437 On or about June 9, 1941, a representative of the United States Office for Emergency Management wrote the British Merchant Shipping Mission, at Washington, D.C., "with respect to payments required to be made by the British Ministry of War Transport under the form of charter party prepared by the Maritime Commission". The United States official stated that the Commission would pay for freight and other specified items, and would receive specified refunds under the charter. Petitioner was not a party to the arrangement so made between these agencies of the United States and British Governments, and was not consulted by either Government as to the terms and conditions of that arrangement.

Petitioner submitted to the Commission the necessary vouchers and documents required for payment under the charter, and on June 23, 1941, petitioner received full payment of the freight payable under the charter in the amount of $336,577. Petitioner credited this sum on its books on or about June 23, 1941, and included it as income

in its Federal income and excess profits tax returns for its tax year ending December 31, 1941.

On July 31, 1942, petitioner received payment of demurrage in the amount of $14,700, which was paid for extra time used in loading and unloading beyond the ten "lay days" allowed under the charter, and on November 4, 1942, petitioner received reimbursement for overtime paid to the crew for the charterer's account in the amount of $295.78. The demurrage of $14,700 was credited on petitioner's books on September 17, 1942, and the overtime of $295.78 was credited on its books on or about November 4, 1942.

Both sums were included as income in petitioner's
438 Federal income and excess profits tax returns for its taxable year ending March 15, 1942.

There was some dispute as to the amounts payable as demurrage and for crew overtime, petitioner submitting claims for these items respectively of $15,265.55 and $722.35. The controversy was between petitioner and the Commission, which audited the claims as submitted by petitioner to the Ministry of War Transport and forwarded by the Ministry to the Commission, and the disagreement was finally settled at the amounts asserted by the Commission.

The full amount of all these payments was made to petitioner by the Commission from Lend-Lease funds appropriated by Congress and allocated by the President to the Commission. These payments were made in accordance with the foregoing communication between the Office for Emergency Management and the British Merchant Shipping Mission.

After completion of the voyage of the Vermont to Port Sudan and of the voyages of other ships chartered in the Red Sea operation, the Commission investigated the results of these voyages and concluded that the owners of the vessels had realized excessive profits. Representatives of the owners were thereafter invited to and attended a meeting of the Commission on November 19, 1942, at which Admiral Land, Chairman of the Commission, stated that "we now are convinced that the rates were too high, and exceedingly so, and it is my feeling that the various steamship owners should

voluntarily make a refund, thereby remedying the
439 situation." He suggested that the rates provided

in the Red Sea charters be revised, and proposed specific terms for such a revision. Some of the owners thereafter agreed to make a refund, but others did not, petitioner being among those who refused.

On November 29, 1943, petitioner received a letter from the Commission, dated November 27, 1943, signed "John R. Paull, Price Adjustment Board", and captioned "Notice of Initial Conference under the Renegotiation Act which shall constitute Commencement of Renegotiation". The letter stated that Price Adjustment Boards had been created in various agencies, including the Commission, to review profits on certain contracts and to determine the existence of excessive profits; that "The renegotiation for your company has been assigned to the Commission's Price Adjustment Board"; that "Notice is given hereby that an initial conference with the Maritime Commission Price Adjustment Board is hereby set for" a time and place specified in the letter; and that certain indicated information was to be furnished by petitioner at that initial conference.

Under cover of a letter of March 31, 1949 from the aforesaid John R. Paull, there was forwarded to petitioner Order No. 172, signed by W. W. Smith, Chairman of the Commission, and dated and issued on March 31, 1949. This order referred to "a contract with the Departments, as defined in the Renegotiation Act, for the transportation of merchandise and other cargo to ports on the Red Sea, said contract having been entered into on or about May 29, 1941, and involving the chartering of space on the Steamship
440 'Vermont', the completion of which contract is determined by the undersigned to have occurred in the Contractor's fiscal year ended December 31, 1942". In reference to this contract, it was determined in the order that $164,000 "represents the portion of the Contractor's profits derived from said contract which is excessive within the meaning of the Renegotiation Act".

The charter of the Vermont was neither a contract with the Commission or with any other department named in the Renegotiation Act, nor a subcontract under such a contract. The contract contained in that charter was only between petitioner and the Ministry of War Transport, acting for the British Government. The Commission did not intend itself to be a party to that contract or to be the charterer of the Vermont. In entering into that contract and in chartering the Vermont, neither the British Government nor the Ministry of War Transport acted as agent for the Commission.

441 OPINION

RAUM, *Judge:* The Renegotiation Act, as amended,[3] sought to limit exploitation of the defense effort for private enrichment by directing renegotiation of certain war contracts in order to eliminate "excessive profits." Power to renegotiate was conferred on specified "Department" heads, to whom the Act referred as "Secretaries", but such power was exercisable only with respect to a "contract with such Department or * * * any subcontract thereunder". Sec. 403(c)(1).[4] Commencement of renegotiation was forbidden "more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs". Sec. 403(c)
442 (6). And the Act was made inoperative where "final payment pursuant to such contract or subcontract was made prior to April 28, 1942", the effective date of the Act. Sec. 403(c)(6)(i).

Petitioner entered into a contract which grew out of the needs of the national emergency in 1941, and respondent, having found that excessive profits were realized on it, seeks their recapture under the Renegotiation Act. Congress authorized renegotiation, however, only where the

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[3] As pointed out in footnote 1, *supra*, the Renegotiation Act was first enacted as Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 245, 50 U. S. C. App. Sec. 1191. It was amended by Section 801 of the Revenue Act of 1942, 56 Stat. 982; Section 1 of the Military Appropriation Act, 1944, 57 Stat. 347-8; Public Law 149, 78th Cong., 1st Sess., 57 Stat. 564; and Section 701 of the Revenue Act of 1943, 58 Stat. 78.

[4] Although some of the amendments made by the Revenue Act of 1943 were retroactive, the applicable provisions herein were left unaffected in relation to cases controlled by existing statute prior to such amendments. Those provisions are found in Section 403(c), quoted above, as well as in Section 403(a). Section 403(a)(1) defined "Department" to mean "the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company, respectively"; and Section 403(a)(2) defined "Secretary", in the case of the Maritime Commission, to mean "the Chairman of such Commission".

restrictions it imposed in the Act were satisfied, and it is not enough under the Congressional mandate that, in a general way, excessive profits on a war contract may have been earned and ought to be recovered. The specific conditions imposed by the Act for renegotiation must be met, or else the Act is inapplicable and power to renegotiate is lacking. It is just such an absence of power that petitioner insists characterized respondent's action in this case, asserting that its contract was not "with such Department" but with the government of a foreign country, Great Britain; that "final payment" was made prior to April 28, 1942; and that renegotiation was not commenced within the period limited in the statute after "completion" of the contract.

The contract in its terms supports petitioner's position on the first of these issues, in that it purports to be a contract only between petitioner and an agency of the British Government. Respondent's reply is that in this matter the British Government acted as the agent of the United States Maritime Commission (to which we refer as the "Commission"); that petitioner's contract was therefore with the Commission; and, since the Commission was one of the "Departments" named in the Act, that the contract was renegotiable. The weight of the evidence, however, requires us to reject respondent's premise that the British Government acted as the Commission's agent, and to con-

443 clude that the contract was not with the Commission.

Accordingly, since it follows that the contract was not subject to renegotiation under the Act, it becomes unnecessary to consider the two remaining objections raised by petitioner.

The factual background of the contract may be briefly stated. In 1941, in accordance with a program for strengthening the position of the United States and other democracies, Congress enacted the so-called Lend-Lease Act (55 Stat. 31, 22 U. S. C. Sec. 411) and the President directed the Commission to build up a shipping pool to be used for defense purposes. The British Government had been acquiring war equipment in the United States but lacked the necessary shipping facilities to transport it, particularly to the Red Sea area for use in the North African theatre. Accordingly, the British authorities requested the United States to furnish such shipping facilities under the Lend-Lease program, and so long as the necessary shipping was provided, and the British Government was not burdened with payment therefor, the British authorities do not ap-

pear to have cared through what arrangements those facilities were furnished. The British request being granted, the task of collecting and making available the required shipping naturally fell to the Commission.

Commission officials summoned and negotiated with various shipowners including petitioner, which owned a steamship named the "Vermont". The officials and the owners, including petitioner, came to an agreement on the terms on which their ships would be provided for the operation to the Red Sea, the agreement being in the form of a space charter [5] or contract of carriage by water between the owners and the British Ministry of War Transport, an agency of the British Government, as charterer. The charter reduced to writing in the agreed form, was then submitted to the Commission for its approval, which was granted subject to certain modifications and conditions, and, in the form approved by the Commission, a charter for the Vermont was then executed between petitioner and the British Ministry of War Transport. Thereafter the Vermont completed its voyage to the Red Sea as required under the charter, and petitioner was paid by the Commission for freight and certain other items.

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The charter itself speaks plainly enough on the identity of the parties between whom it purports to be a contract. It says, in unmistakable language, that it is an agreement "between California Eastern Line, Inc. Owners of the Steamship Vermont * * * and British Ministry of War Transport Charterers".[6] "In this, as in any other case of a written contract, those who are parties to and bound by it are to be ascertained by an inspection of the document, and its provisions are controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded." See *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421-422; *Farm*

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[5] A "space charter", where the charterer generally pays on the basis of space provided for the shipment of his cargo and where the vessel remains under the operating control of the owner, is to be distinguished from a "bareboat charter", where a vessel is rented out for a specified period or voyage and the charterer gets possession and control of the vessel. Cf. *The Steel Inventor*, 35 F. Supp. 986, 994 (D. Md.); *Dampskibsselskabet* v. *Oil Co.*, 310 U. S. 268, 278.

[6] Compare the totally different provision, where the Commission was a party to the charter, in *United States Lines Co.* v. *United States*, 52 F. Supp. 758, 760 n.1 (S. D. N. Y).

Security Administration v. *Herren*, 165 F. 2d 554, 562 (C. A. 8), certiorari denied, 333 U. S. 875.

Nowhere in the charter is there a permissible basis for injecting the Commission as a party to the contract in contradiction of this clear declaration. As a ground for a contrary inference respondent points to the charter provision that "This charter not to become effective until approved by the United States Maritime Commission", and to the signature of the charter, after it had been executed by petitioner and an official of the British Ministry, by a Commission official to show the Commission's approval. It is far from clear, however, that this approval was either required or given because the Commission was acting as a party to the contract; more compelling reasons too readily suggest themselves. Thus, the Shipping Act of 1916, as amended, in Sections 9 and 37 (46 U. S. C. Secs. 808, 835) required approval of the Commission to charter of an American vessel to "any person not a citizen of the United States"; the Commission was aware of and considered this legal prerequisite in giving its approval. This may not only explain, in part at least, the charter requirement of approval, but tends to establish that the Commission did not consider itself as the charterer, or else its approval under that statute would have been unnecessary. If, moreover, the Commission had been a party to the charter, it was required by statute to insert an express condition that no member of or delegate to Congress would share in any profits or benefits thereunder (41 U. S. C. Sec. 22). Presum-
446 ably the Commission was aware of this statutory requirement, and its failure to comply with it tends further to indicate that its approval was required for some reason other than that it was a party to the contract. Such a reason is suggested in the Commission's role as the agency for mobilizing the country's shipping resources and for carrying out and supervising the ocean transportation phase of the Lend-Lease program. The requirement of approval may well have been primarily a control device by which the Commission could assure itself that its functions were being properly executed, that the purposes for which the shipping was furnished were satisfied, and that all this was done in the most effective and economical way possible at the time. In any event, at the very minimum the meaning of the charter requirement of approval is so equivocal that we

cannot assign it any force in overcoming the explicit statement in charter as to the identity of the contracting parties.

On a reading of the charter according to its terms, only one basic contention is advanced by respondent in support of the position that the contract was made with the Commission. That contention is that the contract does not express the true situation in this respect because the British Ministry of War Transport acted as the Commission's agent in entering into the charter, and the resulting contract therefore was actually with the Commission and not the British Ministry. Assuming that respondent may go behind the contract in this fashion, we find, on the evidence, an indispensable element of this position to be lacking. The Commission cannot be treated as the charterer in place of the Ministry at least in the absence of an intent on the
447 Commission's part, at the time the charter was entered into, to be a contracting party and to have the Ministry act as its agent. On the basis of all the evidence, we have concluded that the Commission did not have that intent.

First, within the same period that the Vermont charter was negotiated and executed, the Commission owned freighters which it desired to place in service to Red Sea ports. The Commission did not, however, itself undertake to operate those vessels in that service, but leased them on bareboat [7] charter to two steamship companies as operators, and the latter in turn entered into space charters respecting those ships with the British Ministry of War Transport, which acted for the British Government. The Commission clearly was not the charterer in these contracts between the operators and the Ministry of War Transport; otherwise the leasing of the ships to the operators by the Commission would seem to have been an incomprehensible act of futility. Yet the space charters executed between the operators and the British Ministry for the Commission-owned vessels were, except for names and some slight modifications, identical with the space charter for the Vermont executed between petitioner and the British Ministry. Those space charters of the Commission-owned vessels were, moreover, also drafted by Commission officials; were submitted in proposed form to the Commission for its approval; and provided that they were not to become effective

[7] See note 5, *supra*, as to the nature of a bareboat charter.

until approved by the Commission. Comparison of the
448 Vermont charter with the charters of the Commission-owned vessels by the operators to the Ministry, and of the circumstances surrounding execution of these charters, seems to us to give rise to the valid inference that the Commission was no more a party to the Vermont charter than it was to the charter of its own vessels by the operators to the Ministry; that the Commission no more intended to be a party to the former charter than to the latter; and that the Ministry was no more an agent of the Commission in executing the former than the latter.

Secondly, when negotiations for the Vermont charter were carried on, when agreement was reached on the terms of the charter subject to the Commission's approval, and when that approval was given, the evidence shows that it was the Commission's understanding that it did not have the power to enter into a charter for the hire of ships.[8] On March 19, 1941, a bill had been introduced in Congress to confer such power on the Commission, and that bill had been referred to the Committee On Merchant Marine And Fisheries of the House of Representatives. See H. R. 4088, 77th Cong., 1st Sess., 87 Cong. Rec. 2387. While the bill was being considered by the Committee, and in response to a request of the Committee chairman, Admiral Land, then Chairman of the Commission, wrote to the committee
449 to express the Commission's views. Admiral Land stated: "The bill would authorize the Maritime Commission, until July 1, 1942, to charter and purchase vessels, whether of United States or foreign documentation. . . . Under existing law, the Commission is not authorized to procure vessels by charter." This letter was included verbatim in the committee's report recommending enactment of the measure (H. Rep. No. 440, 77th Cong., 1st

[8] Respondent's contention, that there was a principal-agent relation between the Commission and the Ministry, raises questions not only as to the Commission's authority to hire vessels but also, if such authority existed, as to the Commission's power to exercise that authority through an agent which was a totally separate body and one belonging to a foreign government. These questions need not be treated, however, in view of the evidence that the Commission did not consider itself as having the authority in the first place.

Sess., at 9), and the proposal, conferring power so declared to be lacking, was thereafter adopted on June 6, 1941. Public Law 101, Section 3(a), 77th Cong., 1st Sess., 55 Stat. 242, 243, 50 U. S. C. App. Sec. 1273.[9]

It is difficult to believe that an agency which regards itself as "not authorized to procure vessels by charter", and which asks Congress for legislation conferring such authority on it, would at the same time intend to act in a manner which requires the exercise of that very
450 power.[10] Even if the Vermont charter had been made after enactment of this statute bestowing power to charter vessels, it still would seem not to have been authorized by that statute, since it was a space charter whereas the statute only conferred authority on the Commission "to charter any vessel • • • on a time-charter or bare-boat basis • • •".

Thirdly, in all the evidence contemporaneous with the negotiation, execution, and performance of the charter, there is not, with one doubtful exception,[11] a single refer-

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[9] Public Law 101 enacted H. R. 4466, 77th Cong., 1st Sess., which resulted from a combination of H. R. 4088, of which mention has been made, and H. J. Res. 167, also introduced in 77th Cong., 1st Sess. Section 3 (a) of Public Law 101, dealing with authority to charter, was taken from H. R. 4088.

[10] Respondent suggests that power in the Commission to charter the Vermont, under Section 902 of the Merchant Marine Act of 1936 (46 U. S. C. Sec. 1242), came into effect as a result of the Presidential proclamation of emergency of May 27, 1941 (55 Stat. 1647), which antedated the sailing of the Vermont from New York and of the signature of the charter. Even if it be assumed that this Act conferred such power in these circumstances, there is not the slightest indication in the evidence that the Commission's negotiations were carried on or concluded in anticipation of such power coming into operation. Moreover, as to the actual importance of the proclamation, it is to be noted that Congress nevertheless enacted Public Law 101, which became effective on June 6, 1941. See note 7, *supra*.

[11] In one instance, during the negotiations on the terms of the proposed charter, a ship company official in arguing for a particular arbitration clause designed apparently to settle disputes through some medium other than the Commission, wrote in a communication dated May 13, 1941, that the "Maritime Commission will be a party directly or indirectly to the transaction". He seemed, in this, to be

ence to the Commission as a party to the contract or as charterer, undisclosed or otherwise, of the Vermont. Coupled with this absence of explicit recognition concerning the Commission, there is in marked contrast frequent reference to the British Ministry of War Transport as charterer in correspondence and memoranda of Commission
451 officials, in correspondence of the Chairman of the Commission, and in minutes of meetings of the Commission. Thus this evidence speaks of "charters which were entered into by various steamship owners with the British Ministry of War Transport"; the "charter to the British Ministry of War Transport"; "the charter of privately-owned American flag vessels to the British Ministry of War Transport". The very resolution of the Commission approving the form of charter stated that it was "for use by private owners of American-flag vessels in chartering their vessels to the British Ministry of War Transport, under arrangements heretofore made in cooperation with the Commission or which may hereafter be so made". The same recognition of the Ministry as the charterer, with elaboration of the Commission's role of "cooperation", is found in a letter by Admiral Land to Congressman Edward J. Hart, a member of the House Committee on Merchant Marine and Fisheries and chairman of

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alluding to the Commission's part in arranging and negotiating the charter. If he meant any more, it became clear in later correspondence that he was speaking too broadly; the reply to that communication by a Commission official showed that the understanding between them was that an arm of the British Government was expected to be the charterer, the Commission official referring to the "charterer, who proposed to be British Ministry of Shipping". The same thought appears in the letter of another Commission official written shortly thereafter to the representatives of another ship company, the letter stating that "We have confirmed that the British Ministry of War Transport may be the charterer. However, we are unable to state today that this will be so inasmuch as there are certain details yet to be discussed by us with the British Ministry of War Transport". During the succeeding days it became completely settled that the British Ministry of War Transport was the charterer.

its sub-committee investigating charter rates paid for voyages in the Red Sea operation: "In obtaining the use of ships on a voluntary basis [rather than requisitioning them], the Commission undertook to correlate and direct traffic. Charters were made between the shippers and the owners. The Maritime Commission organized the schedules, spotted the cargo and loading berths, and approved the charter rates. Its control was exercised by indirection. In the case of the Red Sea voyaegs, the ships were chartered by their owners to the British Ministry of War Transport. The charter hire was paid out of lend-lease funds allocated for the purpose, presumably on account of the problem of exchange involved."

452 To establish that the Commission was the charterer and that the British Ministry acted only as its agent, respondent offered two exhibits in evidence: (1) Exhibit G—a certificate executed by an Assistant Secretary of the British Ministry of Transport, together with an unsigned statement attached thereto, the certificate asserting that the statement was "based on information extracted from documents preserved in the archives of the Ministry of Transport (formerly Ministry of War Transport)"; and (2) Exhibit H—correspondence in which the Department of Justice sought "an official statement from the British Government concerning its view as to the relationship between the United States Government and the British Government at the time the charters were executed", together with other correspondence which accompanied transmittal of the material in Exhibit G furnished in response to this request. Petitioner objected to the competence of these exhibits.[12] We have concluded that petitioner's objection should be sustained as to Exhibit G, and, since Exhibit H merely qualifies Exhibit G and falls with it, we have accordingly ruled that both of these exhibits are inadmissible. Exhibit G is not an "official statement from the British Government" as to any of the facts which respondent wishes us to take into account. The evidence upon which respondent

[12] The relevance of these exhibits might also be questioned if it were concluded that the Commission had no power to act through an agent like the British Ministry, and that any attempt to act in this way could not produce a contract with the Commission. These are matters which need not be considered (see note 8, *supra*), and we therefore assume these documents to be relevant.

relies is the statement appended to the certificate.
453 Nowhere in the certificate of the Assistant Secretary of the Ministry of Transport is there any representation that the attached document represents the official views of the British Government; he certifies merely that the statement is "based on information extracted from documents preserved in the archives of the Ministry of Transport", and that to the best of his knowledge and belief it is a true statement. The statement itself does not appear to be an official record, nor is it an official statement of the views of the British Government. It merely incorporates information said to be collected by some unidentified person, and said to have been "extracted" from unidentified and undescribed documents. There are here none of the safeguards in the presence of which the hazards of hearsay evidence and of the absence of cross-examination are risked. Contrary to respondent's contention, Exhibit G does not satisfy the conditions under which official statements are admitted in exception to the hearsay rule. Cf. *Gilbert* v. *Gulf Oil Corp.*, 175 F. 2d 705, 710 (C.A. 4); *United States* v. *Grayson*, 166 F. 2d 863, 868-869 (C.A. 2); *Franklin* v. *Skelly Oil Co.*, 141 F. 2d 568, 572 (C.A. 10); *Von Zedtwitz* v. *Sutherland*, 26 F. 2d 525, 526 (C.A. D.C.); *Guettler* v. *Alfsen*, 289 Fed. 613, 614 (C.A. D.C.). We point out, furthermore, that even if Exhibits G and H were admitted, they would not, taken together with all the other evidence, cause us to change any of our conclusions as to the facts as we have found them. Even in the presence of these exhibits, which reflect at best only the "view" or "understanding" of certain unidentified persons, the evidence in its entirety establishes to our satisfaction that in fact the British
454 Ministry neither acted nor was intended by the Commission to act as the Commission's agent in entering into the Vermont charter, and that the charter was not with the Commission.

Respondent's contention, that the British Ministry acted as the Commission's agent and that the Commission was the charterer of the Vermont, is based on the facts that the Commission negotiated the terms and form of the charter, exercised supervision over performance under the charter, and, in behalf of the United States Government, furnished the funds and controlled payment under the charter. We think it does not necessarily follow, under the Renegotiation Act, that these circumstances stamped the charter as

being a contract with the Commission.[13] The question of fact remained whether on the entire evidence the
455 charter was such a contract. As the repository of these very important powers, the Commission might have chosen in some circumstances to charter the Vermont

[13] Little help is provided on the instant issue by the statutory history of the Renegotiation Act. It is interesting to note in this connection, however, the opinion on another situation of some members of Congress. After the Lend-Lease program was put into effect, certain contracts between American manufacturers and foreign governments, placing large orders for war equipment, were taken over by the United States at the prices fixed in these contracts. Most of the articles covered by the contracts had not yet been produced at the time they were taken over. Production of these items was then supervised by the United States; the goods were paid for by the United States with Lend-Lease funds; and the United States distributed the equipment to the armed forces of foreign governments. One of the agencies acting for the United States in this matter was the War Department, which was one of the "departments" named in the Renegotiation Act. These contracts were not considered to be within that Act. H. Rep. No. 733, 78th Cong., 1st Sess., 25-26 (report on renegotiation of war contracts by House Committee On Naval Affairs, made pursuant to House resolution directing investigation of war effort); 90 Cong. Rec. 1357 (1944) (statement by Congressman Ed. V. Izac, member of House Committee On Naval Affairs, in debate on the amendments to the Renegotiation Act made by the Revenue Act of 1943).

Similarly, although administrative pronouncements do not dispose of the issue before us, they seem to place emphasis on the parties who *entered into* the contract, while apparently not regarding possession of certain powers as conclusive. The Joint Renegotiation Manual, issued under the 1942 Act by the "departments" concerned and given approval by the Maritime Commission, stated (at par. 323.3): "All so-called lend-lease contracts entered into by any of the departments having renegotiation authority are subject to the provisions of the Act. However, lend-lease contracts entered into by any other department or agency of the Government are not subject to renegotiation under existing law." The Renegotiation Regulations For Fiscal

itself, making all other arrangements substantially the same as it did here, and to undertake transportation of the British cargo to the destinations at which it was required. Whatever the reasons may have been, whether because of lack of authority or because of restrictions on its action which exigencies of the international situation then imposed on the United States as a non-belligerent, the fact is that the Commission avoided selection of this course. It chose rather that in which the British Ministry was the charterer and in which the contract was with the British Ministry; to itself the Commission relegated the function of making the arrangement and tending to other matters in a way which would make it possible for the British Ministry to charter the Vermont. The contract in fact was, and was intended to be, with the British Ministry and not with the Commission. Cf. *Waterman S. S. Corporation* v. *Land*, 151 F. 2d 292, 293-296 (C.A. D.C.), reversed on other grounds, sub nom. *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540; *Alabama* v. *King & Boozer*, 314 U.S. 1, 13; *United States* v. *Algoma Lumber Co.*, *supra*; *Farm Security Administration* v. *Herren*, *supra*.

456 In finding for petitioner, it is unnecessary to pass on its contention that the burden of proof in this matter was on respondent. Assuming the burden to be on petitioner, we think that burden was met.

We have reached the result herein with reluctance, since the basic policy underlying the Renegotiation Act would seem to call for the renegotiation of this contract, but we have been unable to conclude that this contract is covered by the statute.

Reviewed by the Court.

Decision will be entered for the petitioner.

Years Ending After June 30, 1943 (issued under the Renegotiation Act) provide (at par. 332.10) in dealing with "Contracts Involving Named Departments and Departments or Agencies other than Named Departments":

"As a general rule, the renegotiability of such contracts depends upon whether the contract is with a named Department and not upon whether a named Department receives delivery of, or pays for, the articles purchased."

457 TURNER, *J.*, dissenting:

I have studied and considered what is said in the opinion of the Court in explanation of its conclusion that the United States was not a party to the charter contract herein. But when all is said and the theorizing is ended, the facts as I read them still show, regardless of the formalities indulged in, that it was the United States, rather than Great Britain, which contracted with the ship owners. The British Government asked the United States to furnish to it a substantial amount of much needed merchant cargo space and the United States, through its Maritime Commission, contracted for and delivered the merchant shipping requested. It is, of course, true that the paper record took the form of space charter contracts directly between various shipowners and the British Government, but I do not believe that even the petitioner, and others likewise resisting renegotiation of similar contracts, could with straight face and countenance seriously contend that the consideration flowing to them under the contracts in question was not the obligation of the United States, rather than that of Great Britain. Certainly, as I understand the evidence, that was the position taken by the British Government when it was asked to sign the charter contracts. It accepted the form taken by the contracts only when it was assured that it would not be so obligated, and it was only after receiving assurances to that effect that its Ministry of War Transport signed the papers in question.

It is true that the charter fees were to be paid from moneys appropriated by the Congress of the United States, under its so-called Lend-Lease legislation, and under that legislation accounts were kept which on their face pictured the expenditures as loans and indicating an obliga-
458 tion on the part of Great Britain to make repayment thereof at some indefinite time in the future. That such, however, was not the commonly accepted meaning and intent of the legislation, is too well known to require discussion. The common understanding based on the public utterances of the President, other Government officials and Members of Congress was that such portions of Lend-Lease funds as might be regarded as having been directly expended and consumed in the prosecution of the war were to be regarded as having been spent by this Government as its contribution thereto and that countries receiving the benefit in their fighting of the war of such expenditures

would never be called on to account for or repay such moneys. That such was the purpose and intent of the Lend-Lease legislation is corroborated, as shown by evidence in the record in this case, by what was done when the representatives of the United States and the British Government sat down together after the end of hostilities to balance their accounts. The attitude taken by the British Government at the time it was requested to sign the charter contract herein was accepted and it was agreed that the money so paid out by the United States were moneys paid by it in pursuance of its participation in the war.

The Court has not, in my opinion, squarely faced and dealt with the purposes and results of the Lend-Lease legislation as it bears upon and affects transactions of the kind involved herein. But rather, it allows itself to be drawn into a consideration and discussion of a question of agency, which, in my opinion, might never be reached if a more realistic approach is made to the question before us.

459-462 [Caption]

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated February 15, 1952, it is

ORDERED and DECIDED: That there is no renegotiable contract within Section 403(c)(1) of the Renegotiation Act.

Enter: ENTERED FEB 26 1952.

/s/ ARNOLD RAUM,
Judge.

[SEAL.]

463 [Caption]

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

The United States of America hereby respectfully petitions for review of the Decision of the Tax Court of the United States in the above captioned proceeding entered February 26, 1952, including the Order of the Tax Court of the United States in the above captioned proceeding dated February 1, 1952.

I

This review is sought by the United States of America. The Chairman of the United States Maritime Commission is named as respondent in the Tax Court proceeding pur-

suant to Rule 64 of the Rules of Practice before the Tax Court.

II

The controversy arose under the provisions of the Renegotiation Act, as amended (Act of April 28, 1942,
464 Chapter 247, Title V, par. 403, 56-245, as amended, 50 U. S. C. App., par. 1191).

III

The Decision sought to be reviewed is the decision of the Tax Court of the United States entered February 26, 1952, in the above captioned matter whereby the Tax Court ordered and decided that "there is no renegotiable contract within Section 403(c)(1) of the Renegotiation Act."

The Decision sought to be reviewed includes the Order of the Trial Judge of the Tax Court of the United States dated February 1, 1952 which ordered "That petitioner's objections to exhibits G and H are sustained, and exhibits G and H are not admitted in evidence".

IV

The Court in which review is sought is the United States Court of Appeals for the District of Columbia Circuit.

The Chairman of the United States Maritime Commission, on March 31, 1949, determined that respondent-appellee had realized excessive profits in the principal amount of $164,000 from a contract for the transportation of cargo to Red Sea ports, the completion of which contract was determined to have occurred in respondent-appellee's fiscal year ended December 31, 1942.

On February 26, 1952, the Tax Court of the United States, after hearings held in Washington, D. C. entered its decision as follows:

465 "Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated February 15, 1952, it is

"ORDERED AND DECIDED: That there is no renegotiable contract within Section 403(c)(1) of the Renegotiation Act."

The Tax Court found and held that the contract in issue was not with a Department of the Government named in the Renegotiation Act and therefore not subject to renegotiation.

The Order of the Tax Court of the United States dated February 1, 1952 sustained petitioner's objections to exhibits G and H and did not admit into evidence the statement by the British Government indicating its views as to the relationship between that Government and the United States of America at the time the contract involved in this proceeding was executed.

The petitioner for review seeks review of the decision and order of the Tax Court of the United States under the provisions of the Internal Revenue Code, Subtitle (A), Chapter 5, Sub-Chapter (B), Act of February 10, 1949, Chapter C-2, 53 Stat. 1, *et seq.*, as amended; 26 U.S.C. Par. 1140-1146, inclusive.

V

The Tax Court of the United States committed error in the following respects:

466 (a) In deciding that pursuant to the determination of the Court set forth in its Finding of Fact and Opinion, respondent-appellee had no renegotiable contract within Section 403 (c)(1) of the Renegotiation Act

(b) In finding and holding that the contract involved herein was neither a contract with the United States Maritime Commission or with any other department named in the Renegotiation Act.

(c) In finding and holding that the contract involved herein was a contract between respondent-appellee and the Ministry of War Transport, acting for the British Government.

(d) In finding and holding that the United States Maritime Commission did not intend itself to be a party to the contract involved herein or to be the charterer of the vessel "Vermont" under such contract.

(e) In finding and holding that neither the British Government nor the Ministry of War Transport acted as agent for the United States Maritime Commission in entering into the contract involved herein or in chartering the vessel "Vermont."

(f) In issuing its order dated February 1, 1952, in which it was ordered that respondent-appellee's objections to the admission in evidence of petitioner on review's Exhibits G and H were sustained, and that Exhibits G and H are not admitted in evidence.

467 (g) In failing to find and hold that it was the intention of both the United States Maritime Commission

and the British Ministry of War Transport that the British Ministry of War Transport act as an agent of the United States Maritime Commission in signing the contract involved herein.

VI

WHEREFORE, petitioner for review prays:

1. That this Honorable Court review the Decision of the Tax Court of the United States entered February 26, 1952, in the above-captioned proceeding, which includes the Order of the Tax Court of the United States dated February 1, 1952.
2. That the decision of the Tax Court be reversed.
3. That petitioner for review be granted such other and further relief as the nature of the case may admit and to this Honorable Court may seem just and proper.

Respectfully submitted,

HOLMES BALDRIDGE,
Assistant Attorney General.

FREDERICK N. CURLEY,
Attorney,
Department of Justice.

JAMES H. PRENTICE,
Attorney,
Department of Justice.

463-469 [Caption]

CERTIFICATE OF SERVICE

I certify that on April 25, 1952, one (1) copy of Petition for Review of Decision of the Tax Court of the United States in the above entitled case was served by me by mail in a Government franked envelope to each of the attorneys for the above named respondent-appellee as follows:

Harold B. Finn, Esquire,
120 Broadway,
New York 5, New York.

Robert E. Kline, Jr., Esquire,
Munsey Building,
Washington 4, D.C.

(S.) FREDERICK N. CURLEY,
Department of Justice,
Attorney for Petitioner for Review.

470 [Caption]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals for the District of Columbia Circuit with reference to the petition for review of the decision of the Tax Court entered February 26, 1952, at Washington, D.C., heretofore filed by the petitioner for review in the above entitled cause, a transcript of the record in said cause relating to said decision, and prepare and transmit as required by law and the rules of said Court of Appeals, and to include in said transcript the following documents or certified copies thereof, to wit:

1. Docket entries of all proceedings to date before the Tax Court;

2. Pleadings before the Tax Court as follows:

(a) Petition filed June 20, 1949, with exhibits attached thereto.

471 (b) Answer filed August 10, 1949 with exhibits attached thereto.

(c) Motion for a Severance of Issues filed by petitioner below, February 1, 1950.

(d) Motion by petitioner for review for leave to file an amended answer filed November 20, 1950.

(e) Amended answer lodged November 20, 1950. Received by the Tax Court of the United States on November 22, 1950.

(f) Order of the Tax Court granting Motion for Severance of Issues dated April 12, 1950.

3. Official typewritten transcript of proceedings before the Tax Court of the United States on March 1, 1950.

4. Agreed statements of issues and stipulation of facts together with exhibits 1 to 78, inclusive, attached thereto, filed March 16, 1951.

5. Official typewritten transcript of proceedings before the Tax Court of the United States on March 16, 1951, together with exhibits A to H, inclusive, and 79 to 80, inclusive.

6. Order of the Tax Court of the United States dated February 1, 1952.

7. Exception by petitioner for review to Order of the Tax Court dated February 1, 1952, filed February 13, 1952.

8. Findings of Fact and Opinion of the Tax Court of the United States promulgated February 15, 1952.

472 9. Decision of the Tax Court of the United States entered February 26, 1952.

10. Petition for review of Decision of the Tax Court of the United States entered February 26, 1952, filed April 25, 1952.

11. Certificate of Service of Notice of Filing Petition for Review on respondent-appellee and of service of a copy of petition for review.

12. Certificate of service on respondent-appellee of this designation of record and statement of points of appeal.

13. Points relied upon as follows:

(a) The Tax Court erred in deciding that respondent-appellee had no renegotiable contract within Section 403 (c)(1) of the Renegotiation Act.

(b) The Tax Court erred in finding and holding that the contract involved herein was neither a contract with the United States Maritime Commission or with any other department named in the Renegotiation Act.

(c) The Tax Court erred in finding and holding that the contract involved herein was a contract between respondent-appellee and the Ministry of War Transport, acting for the British Government.

(d) The Tax Court erred in finding and holding that the United States Maritime Commission did not intend itself to be a party to the contract involved herein or to be the charterer of the vessel "Vermont" under such contract.

473 (e) The Tax Court erred in finding and holding that neither the British Government nor the Ministry of War Transport acted as agent for the United States Maritime Commission in entering into the contract involved herein or in chartering the vessel "Vermont."

(f) The Tax Court erred in issuing its order dated February 1, 1952, in which it was ordered that respondent-appellee's objection to the admission in evidence of petitioner's on review Exhibits G and H were sustained, and not admitted in evidence.

(g) The Tax Court erred in failing to find and hold that it was the intention of both the United States Maritime Commission and the British Ministry of War Transport that the British Ministry of War Transport act as an agent

of the United States Maritime Commission in signing the contract involved herein.

HOLMES BALDRIDGE,
Assistant Attorney General.

FREDERICK N. CURLEY,
Attorney,
Department of Justice.

J. H. PRENTICE,
Attorney.
Department of Justice.

474 [Caption]

CERTIFICATE OF SERVICE

I certify that on April 30, 1942, one (1) copy of Designation of Record on Appeal in the above entitled case was served by me by mail in a Government franked envelope to each of the attorneys for the above named respondent-appellee as follows:

Harold B. Finn, Esquire,
120 Broadway,
New York 5, New York.

Robert E. Kline, Jr., Esquire,
Munsey Building,
Washington 4, D. C.

(S.) FREDERICK N. CURLEY,
Department of Justice,
Attorney for Petitioner for Review.

475 [Caption]

DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD ON APPEAL

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Court of Appeals for the District of Columbia Circuit with reference to the Petition for Review of the decision of the Tax Court entered February 26, 1952, at Washington, D. C., heretofore filed by the Petitioner for Review in the above-entitled cause, the following *additional portions* of the record in said cause relating to said decision:

1. Order of the Tax Court of the United States, dated March 1, 1950.

476 2. Official typewritten transcript of proceedings before the Tax Court of the United States on April 12, 1950.

3. Motion by Petitioner for Review for an extension of time of fourteen (14) days to and including April 2, 1952, within which to file a Motion to Vacate Decision, Receive Further Evidence and Reconsider on the Basis of Additional Evidence, filed and granted on March 14, 1952, with Memorandum in Support of Motion attached thereto.

4. Designation of Record on Appeal, filed by Petitioner for Review on April 30, 1952.

5. Copy of this Designation of Additional Portions of the Record on Appeal, with copy of Certificate of Service on Petitioner for Review.

Dated: Washington, D. C., May 7, 1952.

CLETUS KEATING,
HAROLD B. FINN,
ROBERT E. KLINE, JR.,
Attorneys for Respondent-Appellee.
By ROBERT E. KLINE, JR.,

Service of copy of Designation of Additional Portions of Record acknowledged this 8th day of May, 1952.

FREDERICK N. CURLEY,
Attorney for Petitioner.

U. S. GOVERNMENT PRINTING OFFICE: 1952

310 In The United States Court of Appeals For
The District of Columbia Circuit

No. 11448

[File endorsement omitted.]

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER ON REVIEW

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT ON REVIEW

Motion to remand to the Tax Court with instructions to that court to vacate its decision and dismiss the petition

(Filed July 18, 1952)

Comes now the Petitioner on review and moves the Court to remand this case to the Tax Court of the United States with instructions to the Tax Court to vacate its decision and opinion and to dismiss the petition for the reason that the Tax Court of the United States lacked jurisdiction because of the failure of Respondent on review to substitute the Secretary of Commerce for the Chairman of the United States Maritime Commission as required by the Reorganization Act of 1949 and Reorganization Plan No. 21, of 1950.

Respectfully submitted.

HOLMES BALDRIDGE,
Assistant Attorney General.
EDWARD H. HICKEY,
FREDERICK N. CURLEY,
JAMES H. PRENTICE,
Attorneys, Department of Justice.

311 *Memorandum in support of motion*

This motion is based upon the fact that the respondent on review has failed to substitute the Secretary of Commerce as the party respondent in lieu of the Chairman of the United States Maritime Commission as required by the Reorganization Act of 1949, (63 Stat. 203; 5 U. S. C. 133Z) and Reorganization Plan No. 21 of 1950, (64 Stat. 1273; 46 U. S. C. A. App. 1111) and that the time for such substitution having expired, the Tax Court of the United States when it promulgated its opinion and entered its decision no longer had jurisdiction of the cause. This Court

should, therefore, remand this proceeding with instructions to the Tax Court that it vacate its opinion and decision and dismiss the petition. Defense Supplies Corporation v. Lawrence Warehouse Company, 336 U. S. 631 (1949); Updegraff v. Pace, 88 App. D. C. 202; 188 F. 2nd 646 (1951).

FACTS

The facts pertinent to the question presented are:

1. The unilateral determination which was the basis for the proceeding in the Tax Court was the determination of the Chairman of the United States Maritime Commission. It is dated March 31, 1949 and involves the fiscal year of respondent on review ended December 31, 1942, and was issued under the authority of the Renegotiation Act, as amended, 56 Stat. 245, 56 Stat. 982; 50 U. S. C. A. App. 1191, *et seq.*

2. Pursuant to the authority granted by Section (e) (2) of the Renegotiation Act of 1943; 58 Stat. 78; 50 U. S. C. A., App. 1191 *et seq*, respondent on review filed a petition in the Tax Court, naming the Chairman of the United States Maritime Commission as respondent (see Sec. (a) (1), (a) (2) and (e) (2) of the Renegotiation Act of 1943, *supra;* Rule 64 II of the Tax Court).

3. After the trial, on severed issues, before the
312 Tax Court on March 16, 1951, that Court promulgated its opinion on February 15, 1952 and entered its decision on February 26, 1952. A timely Notice of Appeal was filed by petitioner on review.

4. Reorganization Plan No. 21 of 1950 was effective May 24, 1950 (64 Stat. 1273; 46 U. S. C. A. App. 1111). This plan abolished the United States Maritime Commission, including the offices of the members of the commission and the Chairman thereof, and transferred all the functions of the United States Maritime Commission and of the Chairman of the United States Maritime Commission to the Secretary of Commerce. Reorganization Plan No. 21 of 1950, *supra*, was promulgated under the authority of the Reorganization Act of 1949, *supra*. The Reorganization Act provided a period of 12 months after the effective date of a Reorganization Plan within which a party might, by motion or supplemental petition, request a Court to allow an action pending against the head or officer of an organization affected by such plan to be maintained against the successor of such head or officer of the affected agency or officer. The time for filing such motion or supplemental petition expired May 24, 1951, after the hearing in the Tax Court but before the Tax Court rendered its opinion and decision.

5. The respondent on review in the instant case did not, within the time allowed, file such motion or supplemental petition.

PERTINENT STATUTES

Reorganization Act of 1949 (63 Stat. 203):

SECTION 9— * * * (B) No suit, action, or other proceeding lawfully commenced by or against the head of any agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of the taking effect of any reorganization plan under the provisions of this Act, but the court may, on motion or supplemental petition filed at any time
313 within twelve months after such reorganization plan takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, allow the same to be maintained by or against the successor of such head or officer under the reorganization effected by such plan or, if there be no such successor, against such agency or officer as the President shall designate.

Reorganization Plan No. 21 of 1950 (64 Stat. 1273; 46 U. S. C. A. App. 1111):

SECTION 204—TRANSFER OF FUNCTIONS. Except as otherwise provided in Part I of this reorganization plan, all functions of the United States Maritime Commission and of the Chairman of said Commission are hereby transferred to the Secretary of Commerce. The Secretary of Commerce may from time to time make such provisions as he shall deem appropriate authorizing the performance by the Maritime Administrator of any function transferred to such Secretary by the provisions of this reorganization plan.

SECTION 306—ABOLITION OF MARITIME COMMISSION. The United States Maritime Commission, including the offices of the members of the Commission, is hereby abolished, and the Secretary of Commerce shall provide for the termination of any outstanding affairs of the Commission not otherwise provided for in this reorganization plan.

Renegotiation Act of 1942, as amended, 56 Stat. 245, 56 Stat. 982; 50 U. S. C. A. App. 1191:

SEC. 403. (a) For the purposes of this section—

"(1) The term 'Department' means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

"(2) In the case of the Maritime Commission, the term 'Secretary' means the Chairman of such Commission, and

in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company, the term 'Secretary' means the board of directors of the appropriate corporation."

* * * * * * *

SEC. 403. (c):

"(1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract."

314 The Renegotiation Act of 1943 (58 Stat. 78; 50 U. S. C. A. App. § 1191):

(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with the Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo.

* * * * * * *

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the exist-

ence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination file a petition with The Tax Court of the United States for redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

ARGUMENT

The right of respondent on review to present the case to the Tax Court was granted by section (e) (2) of the Renegotiation Act, *supra*, which permits filing by a party "aggrieved by a determination of the Secretary [or Chairman in the case of the Maritime Commission]."

315 The Chairman of the United States Maritime Commission, whose order was under attack was respondent in the Tax Court.

As pointed out above, effective May 24, 1951, the Maritime Commission, including the offices of the members of the Commission, was specifically abolished.

However, the Statute under which the Reorganization Plan involved was promulgated provided that actions pending "against the head of any agency," in this case the Chairman of the United States Maritime Commission, should not abate with the proviso that any court having on its docket a case to which "the head of any agency" was a party may allow the action to be maintained "against the successor of such head" upon filing a motion or supplemental petition showing the necessity for such survival within twelve months. The successor to the Chairman of the United States Maritime Commission, effective May 24, 1950, was the Sec-

retary of Commerce. The twelve months in which to file expired on May 24, 1951.[1]

Respondent on review in the instant case did not, within the twelve months provided, file a motion or supplemental petition in the Tax Court requesting that the action survive against the Secretary of Commerce.

Accordingly, under well established rules, the cause had abated and the Tax Court lacked jurisdiction to redetermine the amount of excessive profits realized by respondent on review. See, Defense Supplies Corporation v. Lawrence Warehouse Company, supra, in which the Supreme Court said:

> We are asked to assess the effect of the Defense Supplies Corporation's dissolution on an action to which it was a party at the time of dissolution * * * [p. 632].
>
> * * * * * * *
>
> * * * respondents discovered that Defense Supplies Corporation "did not exist." Congress had dissolved the theretofore successful litigant as of July 1, 1945, by the Joint Resolution of June 30, 1945, 59 Stat. 310, and transferred all its assets to the Reconstruction Finance Corporation—after trial, but before judgment, in the District Court [p. 633].

* * * * * * *

316 Three conclusions follow from our interpretation of the statute, plus the Payne and LeCrone interpretations of a statute with nearly identical language. The first is that the Court of Appeals was without jurisdiction to review the merits of the cause, since respondents called for review after the period given for substitution had expired. In addition, the District Court judgment was valid when entered, since it was entered during the one-year period [p. 638].

* * * * * * *

We have held, above, that the Court of Appeals had no jurisdiction to review the merits. LeCrone and Payne show that we likewise have no jurisdiction so far as the

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[1] Section 201 (a) of the Renegotiation Act of 1951 (P. L. 9, 82nd Congress) abolished the War Contracts Price Adjustment Board, the agency charged with renegotiation under the Renegotiation Act of 1943. In that Act, Congress provided for a like period during which the United States could be substituted for the Board in order to prevent abatement. Unlike the situation in the case at bar, where the cause has been abated since May 24, 1951, Congress six weeks after the running of the twelve month period extended from twelve months to two years the time in which substitution of the United States for the Board could be effected. (P. L. 576, 82nd Congress.)

merits are concerned. But that, of course, does not affect our power to set aside the erroneous action of the Court of Appeals. Our supervisory appellate jurisdiction would be of little value if the injustice caused by the decision below were to stand uncorrected. We are not so constricted. The Claussen case, supra, indicates that And Walling v. Reuter, Inc., 321 U. S. 671, 676, and cases cited, is conclusive against respondents' argument [p. 639].

This Court in Updegraff v. Pace, supra, passed upon the effect of a similar statute and in that proceeding this Court said:

> This is an appeal from an order of the District Court dismissing the action for lack of jurisdiction. The case was argued here both on the merits and on the appellee's motion to dismiss the appeal for lack of appellate jurisdiction on the ground that the cause had abated while pending in the District Court prior to the entry of judgment [p. 647].
>
> * * * * * * *
>
> The provisions of 305 (b) [which are similar to Section 9 (B) of the Reorganization Act of 1949, supra, cited above], therefore clearly apply to the case in its present posture. It does not follow, however, that the proper disposition is to dismiss the appeal on the ground the action has abated. The language of § 305 (b) is substantially the same as that involved in Defense Supplies Corp. v. Lawrence Warehouse Co., supra. The Supreme Court there held that the actions did not abate but were only "at an end" after the period for substitution had expired.[3] There the twelve-month period had expired shortly after judgment was entered in the District Court, and accordingly that judgment was not disturbed, the Court stating "* * * the District Court judgment was valid when entered, since it was entered during the one-year period." 336 U. S. at page 638, 69 S. Ct. at page 765, 93 L. Ed. 931. In this respect the instant case differs. Here, the expiration date of the period for substitution came on August 20, 1949; the judgment of the District Court was entered on January 11, 1950. Coming afterwards, as did the judgment of the Court of Appeals on review of the merits in the Defense Supplies Corp. case, it is similarly defective. * * *
>
> The proper disposition of the appeal, therefore, is to vacate the judgment of the District Court and remand with

[3] See, also, Snyder v. Buck, 1950, 340 U. S. 15, 18–19, 71 S. Ct. 93.

directions to dismiss the action without prejudice to its renewal against the proper party [p. 649].

317 Since it is clear that the action had abated prior to the time that the Tax Court rendered its opinion and entered its decision, it is respectfully requested that the Motion to Remand to the Tax Court with Instructions to that Court to Vacate its Decision and Dismiss the Petition be granted.

Respectfully submitted.

HOLMES BALDRIDGE,
Assistant Attorney General.
EDWARD H. HICKEY,
FREDERICK N. CURLEY,
JAMES H. PRENTICE,
Attorneys, Department of Justice.

318 [Certificate of Service omitted in printing.]

319 In United States Court of Appeals

[File endorsement omitted.]
[Title omitted.]

Motion to dismiss petition for review

(Filed August 25, 1952)

Comes now the respondent and moves the Court to dismiss the petition for review on the ground that the Court lacks jurisdiction to review or redetermine any of the errors alleged to have been committed by the Tax Court, as set forth in the petition for review, none of which involves a constitutional or jurisdictional question.

Respondent submits the annexed memorandum in support of its motion.

Respectfully submitted.

CLETUS KEATING,
HAROLD B. FINN,
Robert E. Kline, Jr.,
ROBERT E. KLINE, JR.,
Attorneys for Respondent,
Munsey Building, Washington 4, D. C.

[Proof of service omitted in printing.]

320 *Memorandum for respondent in support of motion to dismiss the petition for review*

STATEMENT

This is a renegotiation proceeding originally commenced in November, 1943, by the Price Adjustment Board of the United States Maritime Commission, with respect to profits received by respondent under a charter party dated May 29, 1941, between respondent and the British Ministry of War Transport.[1]

On March 31, 1949, Admiral W. W. Smith, who was then Chairman of the Maritime Commission, issued and entered a unilateral order determining that respondent had realized excessive profits "under a contract with the Departments (sic) as defined in the Renegotiation Act." Respondent, pursuant to Section 403 (c) (2) of the Renegotiation Act,[2] then filed a petition with the Tax Court of the United States on June 20, 1949, asking that tribunal for a redetermination of the amount, if any, of its alleged excessive profits.

A hearing on the so-called "coverage issues" was held on March 16, 1951, before one of the judges of the tax tribunal, who,
321 on February 15, 1952, promulgated Findings of Fact and Opinion, determining that the charter party was not a renegotiable contract within the meaning of Section 403 (c) (1) of the Renegotiation Act (17 T. C. No. 159). This action was followed by the entry of a final order and decision to the same effect, on February 26, 1952.

On April 25, 1952, the petitioner herein, purporting to proceed under authority of Sections 1140–1146, inclusive, of the Internal Revenue Code (U. S. C. A., Title 26, §§ 1140–1146) and Rule 36 of this Court, filed a petition for review with the clerk of the tax tribunal. He, in due course, prepared and transmitted the record on review to the clerk of this Court, and on June 3, 1952, the case was docketed here.

Later, by a motion filed on July 18, 1952, petitioner moved this Court to remand the case to the Tax Court with instructions to vacate its decision and opinion and to dismiss the petition, on the ground that "the Tax Court of the United States lacked jurisdic-

[1] The form of charter party, and the circumstances under which it was negotiated, executed and performed, were in all material respects identical with those considered by this Court in *Waterman Steamship Corporation v. Land, et al.*, 80 App. D. C. 167, 151 F. 2d 292 (1945), reversed by the Supreme Court on a point of administrative procedure in *Macauley, et al. v. Waterman Steamship Corporation*, 327 U. S. 540 (1946).

[2] Section (c) (2) of the Renegotiation Act, which Act was Section 403 of Title IV of an Act of April 28, 1942, 56 Stat. 245, as amended, 50 U. S. C. A. Appendix, § 1191 (c) (2).

tion because of the failure of respondent on review to substitute the Secretary of Commerce for the Chairman of the United States Maritime Commission as required by the Reorganization Act of 1949 and Reorganization Plan No. 21 of 1950."[3] Respondent has filed an objection to that motion, with a supporting memorandum, and the question it presents is now before the Court for decision.

322 The present motion presents an entirely different question and is based on other grounds. Whereas petitioner has moved the Court *to remand the case* to the Tax Court with instructions to dismiss on the ground that the Tax Court proceeding had abated and the tribunal lacked jurisdiction to enter its decision, this motion by respondent is *to dismiss the petition for review* on the ground that *this Court* lacks jurisdiction to review or redetermine any of the "errors" alleged to have been committed by the Tax Court, as set forth in the petition for review.

THE QUESTION PRESENTED

The question presented by this motion, therefore, is whether this Court has jurisdiction under Section 403 (e) of the Renegotiation Act or Sections 1140–1146 of the Internal Revenue Code to review or redetermine any of the following "errors" which, according to Article V of the petition for review, were committed by the Tax Court:

"(a) In deciding that pursuant to the determination of the Court set forth in its Findings of Fact and Opinion, respondent-appellee had no renegotiable contract within Section 403 (c) (1) of the Renegotiation Act.

"(b) In finding and holding that the contract involved herein was neither a contract with the United States Maritime Commission or with any other department named in the Renegotiation Act.

"(c) In finding and holding that the contract involved
323 herein was a contract between respondent-appellee and the Ministry of War Transport, acting for the British Government.

"(d) In finding and holding that the United States Maritime Commission did not intend itself to be a party to the contract involved herein or to be the charterer of the vessel 'Vermont' under such contract.

"(e) In finding and holding that neither the British Government nor the Ministry of War Transport acted as agent for the

[3] This belated "plea in abatement" was not raised by the Government in the Tax Court proceedings nor in the petition for review. The Government asserted it for the first time on July 18, 1952, when it filed the motion to remand.

United States Maritime Commission in entering into the contract involved herein or in chartering the vessel 'Vermont'.

"(f) In issuing its order dated February 1, 1952, in which it was ordered that respondent-appellee's objections to the admission in evidence of petitioner on review's Exhibits G and H were sustained, and that Exhibits G and H are not admitted in evidence.

"(g) In failing to find and hold that it was the intention of both the United States Maritime Commission and the British Ministry of War Transport that the British Ministry of War Transport act as an agent of the United States Maritime Commission in signing the contract involved herein."

Respondent contends that in each instance the alleged error involved a determination by the Tax Court of questions which the Renegotiation Act placed within the exclusive and unreviewable jurisdiction of the Tax Court, especially since none of the alleged errors involved a constitutional or jurisdictional question.

324 ARGUMENT

I

It is elementary that when the Tax Court of the United States, by order or decision, finally determines the amount, if any, of the excessive profits received or accrued by a contractor or subcontractor, such determination may not be reviewed or redetermined by this or any other court or agency. Section 403 (e) of the Renegotiation Act so provides, and no court has ever held otherwise.[4]

The Supreme Court, moreover, has stated that "a decision as to what are and are not negotiable contracts is an essential part in determining *the amount of a contractor's excessive profits.*" Macauley v. Waterman S. S. Corp., 1946, 327 U. S. 540, 544. See also Lowell Wool By-Products Co. v. War Contracts Price Adjustment Board, 1951, —— U. S. App. D. C. ——, 192 F. 2d 405.

Nevertheless, a difference of judicial opinion exists as to whether the Renegotiation Act forbids judicial review of any act of the Tax Court in a renegotiation case. In the ninth circuit, for example, it has been held that the Act prohibits any review whatsoever. French v. War Contracts Price Adjustment Board,
325 C. C. A. 9th, 1950, 182 F. 2d 560. But in this circuit it is settled that a contractor, by filing a petition for review pursuant to Sections 1140-1146 of the Internal Revenue Code

[4] Section 403 (e) (1) provides: "Upon such filing such Court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." Section 403 (e) (2), under which this proceeding was filed in the Tax Court, incorporates by reference the same provision.

(U. S. C. A. Title 26, §§ 1140-1146), may obtain a review of a Tax Court order or decision in a renegotiation case, but "only in respect to constitutional or jurisdictional questions." Knu-Vise, Inc., v. War Contracts Price Adjustment Board, 1952, —— U. S. App. D. C. ——, 195 F. 2d 198.

It is also the settled law of this circuit that, conversely, questions which are neither constitutional nor jurisdictional are not subject to review or redetermination by this Court, because such questions are ones "which the Tax Court under the statute has exclusive and final jurisdiction to determine." Psaty & Fuhrman v. Stimson, Secretary of War, 1950, —— U. S. App. D. C. ——, 182 F. 2d 985, and cases cited.

Here, then, the initial question to be determined by the Court is whether any of the assigned "errors", set forth in the petition for review and quoted above, raises a question which is either constitutional or jurisdictional. If not, the petition fails to state a case within the limited jurisdiction of this Court, as defined by the Court itself, and the petition must be dismissed for lack of jurisdiction. Psaty & Fuhrman v. Stimson, Secretary of War, supra.

II

It is obvious, we submit, that the assigned errors do not present any such constitutional or jurisdictional questions. Individually and collectively, they merely express petitioner's dissatis-
326 faction with the tribunal's Findings of Fact and Opinion (17 T. C. No. 159), wherein it was determined after a hearing on the merits that:

> The charter of the Vermont [the only contract involved in the case] was neither a contract with the Commission or with any other department named in the Renegotiation Act, nor a subcontract under such a contract. The contract contained in that charter was only between petitioner and the Ministry of War Transport, acting for the British Government. The Commission did not intend itself to be a party to that contract or to be the charterer of the Vermont. In entering into that contract and in chartering the Vermont, neither the British Government nor the Ministry of War Transport acted as agent for the Commission. (Findings of Fact, last paragraph.)[5]

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[5] These facts are substantially identical with those which this Court *deemed* to be true for the purposes of reaching its decision in *Waterman S. S. Corp.* v. *Land*, 1945, 80 U. S. App. D. C. 167, 151 F. 2d 292, reversed on a point of administrative procedure in *Macaulay* v. *Waterman S. S. Corp.*, *supra*.

The Tax Court's "decision", which technically is the subject of the proceeding in this Court, merely summarized in a single sentence the Finding of Fact and Opinion promulgated on February 15, 1952. It simply provides that:

> Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated February 15, 1952, it is
>
> Ordered and decided: That there is no renegotiable contract within Section 403 (c) (1) of the Renegotiation Act.

Accordingly, since neither the petitioner nor the "respondent" below challenged the constitutionality of the Renegotiation Act or the jurisdiction of the Tax Court, that tribunal was not called upon to decide, and did not decide, any such constitutional or jurisdictional question. Clearly then, neither "the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated February 15, 1952," nor the formal order and decision that "there is no renegotiable contract within Section 403 (c) (1) of the Renegotiation Act" is reviewable by this Court, under authority of U. S. Electrical Motors v. Jones, 1946, 80 U. S. App. D. C. 329, 153 F. 2d 134, or of any subsequent decisions based on that precedent.

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There, as the Court may recall, this Court took jurisdiction of the petition for review, but only because:

> The order of the Tax Court from which this appeal was taken relates solely to its jurisdiction. It does not relate to the amount of excessive profits, if any, or to any question of law or fact, excepting only the question of jurisdiction to entertain the petition.

In the present case, however, the order of the Tax Court from which this "appeal" was taken did not relate in any respect to that tribunal's jurisdiction. That question, so far as respondent's contract was concerned, was settled by the Supreme Court in the Waterman case. It was therefore assumed by all concerned that the Tax Court had exclusive jurisdiction to determine whether or not the contract involved was a renegotiable contract, because, as the Supreme Court remarked in that case, a decision on the coverage question was "an essential part in determining the amount of a contractor's excessive profits."

In short, although the Government has had its "day in court" before the one tribunal vested with exclusive jurisdiction to decide the issue of coverage, it is now seeking to continue this long drawn out renegotiation proceeding even further, by asking this Court to review and redetermine the same issue "de novo", presumably on some theory that the Tax Court's

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decision involved a jurisdictional issue. "To grant such a proposition", as Judge Groner said in the Waterman case, "would be contrary to the principles of expeditious justice". How true, when it is recalled that this proceeding was commenced by the Maritime Commission almost nine years ago, in November, 1943, with respect to a contract which this Court and the Tax Court have considered to be nothing more than a private contract with the British Government!

III

Nevertheless, in an attempt to sustain jurisdiction in this Court, petitioner will probably point to its motion to remand as a basis for invoking this Court's limited power of review—on the ground that it at least raises a question concerning the Tax Court's jurisdiction, even if the petition for review does not.

But the "jurisdictional" question raised by the motion to remand, as we have shown in our memorandum opposing the motion, is really no more than a question of administrative procedure. Even if it be considered jurisdictional, however, it still would be insufficient to vest jurisdiction in this Court. For the question presented by the motion was never raised in the Tax Court; the Tax Court's decision did not decide it; and the petition for review filed on April 25, 1952, did not ask that it be "reviewed" by this Court. Therefore, for the purpose of testing its jurisdic-
329 tion in this case, the Court should disregard the motion to remand, and look only to the questions presented by the petition for review.

Obviously, unless this Court had acquired jurisdiction of the proceeding before the filing of the motion on July 18, 1952, that belated action on the part of the petitioner could not then vest jurisdiction in the Court. For the Internal Revenue Code, pursuant to which the petition for review was filed, provides that such a petition must be filed within *three* months after the entry of the Tax Court's decision (§ 1142); and, unless such a petition "has been duly filed within such time", the decision of the Tax Court becomes "final" (§ 1140–a). Therefore, if, as we contend, the petition for review was jurisdictionally defective, it was not a petition "duly filed" before the expiration of the statutory period (May 26, 1952), and no action by petitioner could cure that fatal defect. And if that be so, the Tax Court's decision in this proceeding became "final" as of May 26, 1952, and both the petition for review and the motion to remand should now be *dismissed* for lack of jurisdiction.

But, whether the Court dismisses the motion to remand for lack of jurisdiction to entertain it, or denies the motion for lack of legal merit, it will thereby eliminate from the case the only

question of jurisdiction raised by petitioner. Then, if not before, the Court should grant this motion to dismiss as a matter of course.

330 IV

We respectfully suggest to the Court, therefore, that the proper and just disposition of the two questions now before the Court would be *to dismiss* both the petition for review and the motion to remand, for lack of jurisdiction in this Court.

Respectfully submitted.

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331 In United States Court of Appeals

[File endorsement omitted.]

[Title omitted.]

Before CLARK, PRETTYMAN and WASHINGTON, Circuit Judges, in Chambers.

Order to show cause

(Filed December 4, 1952)

It is ordered by the Court that petitioner herein show cause within 15 days why this case should not be dismissed for lack of jurisdiction on the part of this Court. See United States v. Siegel, 83 U. S. App. D. C. 88, 168 F. 2d 143 (1948); Davis v. Preston, 280 U. S. 406, 408 (1930); Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U. S. 631, 638 (1949); Snyder v. Buck, 340 U. S. 15, 20 (1950). Respondent may file a reply within 15 days after petitioner's answer is filed.

Dated: Dec. 4, 1952.

Per Curiam.

332 In United States Court of Appeals

For the District of Columbia Circuit

[Filed endorsement omitted.]

No. 11448

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

On motion of petitioner to remand to the Tax Court of the United States with instructions to vacate decision and dismiss petition for review

(Decided April 16, 1953)

Messrs. Frederick N. Curley and Edward H. Hickey, Attorneys, Department of Justice, for petitioner.

Messrs. Harold B. Finn, pro hac vice, by special leave of Court, and Robert E. Kline, Jr., for respondent.

Mr. Joseph P. Tumulty, Jr., for Viking Corporation, amicus curiae, filed a memorandum urging that petitioner's motion be denied.

Before CLARK, PRETTYMAN and WASHINGTON, Circuit Judges.

Opinion

(Filed April 16, 1953)

WASHINGTON, *Circuit Judge:* This is a renegotiation case, in which a motion was made by Government counsel to remand the cause to the Tax Court of the United States with instructions to vacate its decision. The ground of the motion was that the
333 position of the Government official named as respondent in the Tax Court proceeding has been abolished and the cause has abated for want of substitution of the successor to his functions.

In 1949, the Chairman of the United States Maritime Commission determined that the California Eastern Line, Inc., had made excessive profits in 1942 under an allegedly renegotiable contract. California Eastern thereupon petitioned the Tax Court for a redetermination under the Renegotiation Act, as amended, 50 U. S. C. A. App. § 1191, naming the Chairman of the Maritime Commission as respondent. A hearing was held in the Tax Court

in March 1951 on the question whether the contract in issue was subject to the Renegotiation Act. The Tax Court held, in February 1952, that the contract was not a renegotiable contract within the meaning of Section 403 (c) (1) of the Act. 17 T. C. 1325 (1952). On April 25, 1952, a petition for review addressed to this court was filed by Government counsel with the clerk of the Tax Court. The case was docketed in this court on June 3, 1952. On July 18, 1952, the instant motion was filed by counsel for the Government.

I

The moving papers rely on the fact that under Reorganization Plan No. 21 of 1950, which became effective May 24, 1950, the United States Maritime Commission and the Office of its Chairman were abolished, and those functions of the Commission and of its Chairman which are relevant here were transferred to the Secretary of Commerce. 64 Stat. 1273; 46 U. S. C. A. App. § 1111. The Plan was adopted pursuant to the provisions of the Reorganization Act of 1949, 5 U. S. C. A. § 133z, *et seq.*, which included the following provision in Section 9:

> No suit, action, or other proceeding lawfully commenced by or against the head of any agency or other officer of the United States, in his official capacity or in relation to
> 334 the discharge of his official duties, shall abate by reason of the taking effect of any reorganization plan under the provisions of sections 133z to 133z—15 of this title, but the court may, on motion or supplemental petition filed at any time within twelve months after such reorganization plan takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, allow the same to be maintained by or against the successor of such head or officer under the reorganization effected by such plan, or, if there be no such successor, against such agency or officer as the President shall designate. June 20, 1949, c. 226, Title I, § 9, 63 Stat. 206; 5 U. S. C. A. § 133z—7 (b).

Counsel for the Government argues that since California Eastern did not file a motion or supplemental petition in the Tax Court within the twelve-month period following May 24, 1950, requesting that the action survive against the Secretary of Commerce, the cause abated and the Tax Court was without jurisdiction to render its decision.

In support of its motion, the Government urges that an appellate court can and should prevent a lower court from disregarding the principles of abatement. It contends that if a judgment has

been rendered which does not give proper effect to the abatement of the cause, the appellate court should exercise its supervisory jurisdiction to require the outstanding judgment to be vacated, while on the other hand if the lower court has properly abated an action, the appellate court should allow the judgment of abatement to stand. The decisions go far toward establishing these general propositions.[1] In any event we think we must con-
335 sider whether there is now outstanding an invalid judgment in an abated cause, which should be prevented "from spawning any legal consequences." United States v. Munsingwear, Inc., supra note 1, 340 U. S. at 41 (1950).

We turn, then, to the statute on which the Government relies. The Reorganization Act of 1949, in the provision above-quoted relative to abatement, speaks of a "suit, action, or other proceeding." This must mean a suit, action, or proceeding before a court, for the second clause of the provision says "the court" may allow survival. The statute's primary purpose was evidently to ameliorate the harsh consequences of the common-law abatement rules usually applicable to judicial proceedings.[2] Any effect it has in causing termination of a "suit, action, or other proceeding" would appear to be secondary. Administrative proceedings, as far as we can discover, have never been held to be subject to the common-law rules of abatement. In principle they should not be, and a statute should not be interpreted as making them so subject unless the legislative intent clearly so requires. Changes in the personnel or organization of the executive branch should not be permitted, without good purpose, to delay or hinder the citizen in his dealings with any part of it.

The renegotiation proceedings had in this case were wholly administrative in nature. There could be no judicial review until after the Tax Court rendered its decision. The proceeding in the Tax Court was not an adversary action: it did not require judgment against some person or agency. Rather its goal was a redetermination, following the initial executive determina-
336 tion, of the amount by which the contractor's profits were excessive. 50 U. S. C. A. App. § 1191 (e) (1). Neither was the Tax Court proceeding a review: it is to "be treated as a

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[1] *United States* v. *Seigel*, 83 U. S. App. D. C. 88, 168 F. 2d 143 (1948); *Davis* v. *Preston*, 280 U. S. 406 (1930); *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U. S. 631 (1949); *Snyder* v. *Buck*, 340 U. S. 15, 20–21 (1950); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950); and *McGrath* v. *National Association of Manufacturers*, 344 U. S. 804 (1952).

[2] *Cf. Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, *supra*, 336 U. S. at 636–37: "The statute states categorically that 'no action shall abate.' . . . If Congress states that no action shall abate, we fail to see why we should make additional language a proviso." See also *Snyder* v. *Buck*, *supra*, 340 U. S. at 19.

proceeding de novo." *Ibid.* In such cases, the head of the agency alleging excessive profits is named as respondent, under the rules of the Tax Court. But he is named by title as an impersonal officer, not as an individual person.[3] Throughout the proceedings, whether the matter is before the primary agency or before the Tax Court, the citizen is still seeking or resisting an executive determination; the matter is still in the bosom of the executive branch. In the words of the governing statute, the Tax Court is "an independent agency in the Executive Branch of the Government," which "shall be known as The Tax Court. . . ." 26 U. S. C. A. § 1100. It has been consistently held to be not a court, but "an executive or administrative board."[4]

In renegotiation proceedings before the Tax Court, the doctrines of abatement and substitution applicable to judicial proceedings are not in our view required for the protection either of the citizen or of the Government. On the Government's side, it is the national treasury which, in any event, will ultimately
337 gain or lose as against the citizen. And the hazard that the proper Government official may not be named as respondent under the rules of the Tax Court presents no serious difficulty. In the instant case, no affirmative relief was asked against the Chairman of the Maritime Commission in the Tax Court proceedings; the Tax Court was simply to review his order and redetermine the matters there involved. Abatement on the ground that the Chairman was no longer in office or his office no longer in existence would not bear any relation to the realities to the situation, and would defeat the ends of justice. We would not willingly reach that result unless required to do so by legislation or proper administrative rule. In the present case we find no such statutory or administrative requirement. Accordingly we deny the Government's motion to remand the cause to the Tax Court with directions to vacate its judgment.

II

After argument of the Government's motion, we raised on our own initiative—and asked the parties to brief—a further juris-

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[3] Rule 64–II, 26 U. S. C. A. fol. § 1111. In tax cases Rule 12 of the Tax Court requires that a copy of the petition be served upon "the Commissioner." No person is named by name. The proceeding does not abate if a Commission leaves office or dies. *Cf.* Rusk v. Commissioner of Internal Revenue, 53 F. 2d 428 (7th Cir. 1931); 26 U. S. C. A. § 1143. Rule 64 of the Tax Court provides that in renegotiation cases the same rules apply and that when the rules say "Commissioner" they shall refer to "the Board" or "the Secretary" as used in the Renegotiation Act. It further provides that in renegotiation proceedings "the Board" or "the Secretary . . . shall be shown as the respondent."

[4] *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U. S. 716, 725 (1929); *Rusk* v. *Commissioner of Internal Revenue*, 53 F. 2d 428 (7th Cir. 1931).

dictional question, based on the following facts: The petition to this court, filed on April 25, 1952, was captioned "Chairman of the United States Maritime Commission, Petitioner for Review vs. California Eastern Line, Inc., Respondent Appellee." The petition begins by saying: "The United States of America hereby respectfully petitions for review of the Decision of the Tax Court of the United States . . . . This review is sought by the United States of America." Nothing in the petition advised this court that there was no Chairman of the United States Maritime Commission then in office, or that the functions of the Chairman had long since been transferred to the Secretary of Commerce. It was not until July 18, 1952, when the motion to remand was filed by Government counsel, that this court was advised of the facts. The Secretary of Commerce has not appeared, or sought to appear, in the cause.

338 On these facts, the question presented is one of jurisdiction over the parties. We hold in this case that the provisions of Section 9 of the Reorganization Act concerning abatement are inapplicable to proceedings in the Tax Court in which an agency or officer later affected by a reorganization plan is named as respondent. The same must be said of the corollary substitution provisions of that section. The status of the present proceedings in this court is therefore not governed by the parties' failure to comply with those substitution provisions.[5] The question, rather, is whether we now have before us a justiciable controversy, between proper parties. We start with the judgment of the Tax Court, validly entered insofar as any problem of abatement and substitution is concerned. Was either the "Chairman of the U. S. Maritime Commission" or the "United States of America" entitled to challenge that judgment in the courts?

The statute provides that the Tax Court shall "finally determine" the amount of excessive profits in renegotiation proceedings, and that its decision shall not be reviewable. 50 U. S. C. A. App. § 1191 (e) (1). But we have held that an administra-

339 tive agency cannot finally determine the extent of its own jurisdiction, and hence that judgments of the Tax Court in renegotiation cases may be examined in this court to determine

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[5] *Cf. Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U. S. 631 (1949), in which it was held that an appellate court had no jurisdiction to review a cause on the merits where the respondent "called for review after the period given for substitution [of a Government official] had expired." 336 U. S. at 638. But in that case the statutory provisions for abatement and substitution were applicable to the proceedings in the tribunal below. The provisions of Section 9 are not applicable to the *judicial* proceedings in this case, begun after the judgment of the Tax Court was rendered and after Reorganization Plan No. 21 became fully effective. The only actions to which Section 9 applies would appear to be those "lawfully commenced by or against" a Government official who is later stripped of his relevant functions, or otherwise affected, by a reorganization plan.

whether jurisdictional or constitutional limits have been exceeded.[6] Our review takes place pursuant to Section 1141 of Title 26 of the United States Code, the general statute governing review of Tax Court decisions. In a tax case brought under that section, "the Commissioner" (of Internal Revenue) may petition for judicial review. 26 U. S. C. A. § 1142, and if the office changes hands while such a case is pending before the Tax Court or an appellate court, no substitution occurs or is required.[7] In renegotiation cases, the statute is not specific on these points. Cf *U. S. Electrical Motors v. Jones*, 80 U. S. App. D. C. at 332, 153 F. 2d at 137. But the statute does say, 50 U. S. C. A. App. § 1191 (e) (1), that in renegotiation cases the Tax Court shall have the same "powers and duties," in respect of the parties, as it has under the Internal Revenue Code provisions governing Tax Court procedure.[8] We think it clear that procedure in tax and renegotiation cases in the Tax Court is intended to be as nearly as possible the same. A like principle should be applied to proceedings in this court.

340 Neither statute nor Tax Court rule makes specific provision for the problem arising if the office of "Commissioner" is abolished.[9] The statutory provision negating any requirement of substitution deals rather with the problem arising "when the incumbent of the office of Commissioner changes." But the policy of preserving the continuity of litigation in the one case points to a like result in the other. Under this view, a petition filed here in the name of the Chairman of the Maritime Commission should be held sufficient to warrant our review, even though the office has been abolished and the former incumbent has become a private citizen. We need not, however, go so far.

The petition here stated in its text that it was brought on behalf of the United States. We think that fact should be given effect. The United States, in its fiscal aspect, was the true opponent of the claims of the contractor before the administrative agency: it did not need to intervene in the proceeding before the Tax Court,

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[6] *Knu-Vise, Inc. v. War Contracts Price Adjustment Board*, 90 U. S. App. D. C. 218, 195 F. 2d 198 (1952); *Lowell Wool By-Products Co. v. War Contracts Price Adjustment Board*, 89 U. S. App. D. C. 281, 192 F. 2d 405 (1951); *U. S. Electrical Motors v. Jones*, 80 U. S. App. D. C. 329, 153 F. 2d 134 (1946).

[7] See fn. 3, *supra*. 26 U. S. C. A. § 1143 provides that "When the incumbent of the office of Commissioner changes, no substitution of the name of his successor shall be required in proceedings pending . . . before any appellate court reviewing the action of the Tax Court."

[8] Including the section giving the Tax Court power to make rules of practice and procedure, 26 U. S. C. A. § 1111. "Commissioner," of course, is broadly defined in renegotiation cases. See note 3, supra.

[9] Compare Reorganization Plan No. 26 of 1950, effective July 31, 1950, 15 Fed. Reg. 4935, 64 Stat. 1280, which transfers all functions of the Commissioner of Internal Revenue to the Secretary of the Treasury. The latter is empowered to authorize the performance of those functions by any other officer, agency, or employee of the Department of the Treasury. The office of Commissioner is not abolished, but its powers are subject to diminution.

for the governing statute had in substance placed it there. Congress had authorized the Tax Court to give relief to an aggrieved contractor, and had not deemed it necessary to say specifically that the United States or anyone else should be named as defendant. The Tax Court by its rules created the requirement that a respondent be expressly named—but even so (as we have seen) it required that an officer of the United States be named, in his capacity as an official and not in his individual capacity.
341 For reasons akin, therefore, to those which led us to hold that the proceeding in the Tax Court did not abate, we hold that the petition for review filed in the name of the United States was sufficient to invoke our jurisdiction.[10]

At the same time, we think this proceeding should not continue further without the appearance before us of the official who has succeeded to the powers and functions of the Chairman of the Maritime Commission. Proper exercise of the powers of this court, as well as full protection of the interests of the taxpayer, makes the appearance here of the Secretary of Commerce as a party to this cause desirable if not necessary.[11] The Secretary of Commerce will be given twenty days within which to move to join himself as a party, and to move to correct the caption of the cause. If he fails to do so, we will entertain a motion to dismiss the proceeding.

III

The California Eastern Line has filed a motion to dismiss the Government's petition on the ground that this court lacks jurisdiction by reason of the nature of the question presented, contending it is not one of those which this court will review under the doctrine of *U. S. Electrical Motors* v. *Jones*, *supra*. We
342 defer decision on that motion, as it deals with the substance of the petition for review. The case will be set down for hearing on the merits after the briefs have been filed.

So ordered.

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[10] Our decision in *United States* v. *Seigel*, 83 U. S. App. D. C. 88, 168 F. 2d 143 (1948), does not dictate otherwise. There, we held that "one who is not a party to a record and judgment is not entitled to appeal therefrom." 83 U. S. App. D. C. at 89, 168 F. 2d at 144. But the present proceeding is not an appeal—it is an original judicial proceeding, commenced by petition, to review the decision of an administrative body. The Seigel case therefore seems to us inapplicable here.

[11] *Compare Land* v. *Dollar*, 88 U. S. App. D. C. 162, 188 F. 2d 629 (1951), cert. denied 340 U. S. 948 (1951); *Land* v. *Dollar*, 88 U. S. App. D. C. 311, 190 F. 2d 366 (1951); *Land* v. *Dollar*, 89 U. S. App. D. C. 38, 190 F. 2d 623 (1951); s. c. 344 U. S. 806 (1952).

343 In United States Court of Appeals

[File endorsement omitted.]
[Title omitted.]

Order denying motion to remand the case, etc.

(Filed April 16, 1953)

The above-entitled case came on to be heard on the motion of petitioner to remand the case to the Tax Court of the United States with instructions to vacate the decision on review herein and to dismiss the petition for review, and was argued by counsel.

On consideration whereof, it is ordered by the Court that, for the reasons indicated in the opinion this day filed herein, the said motion of petitioner be, and it is hereby, denied.

It is further ordered by the Court that the Secretary of Commerce of the United States be, and he is hereby, allowed to and including May 6, 1953, within which to move in this Court in the above-entitled case to join himself as a party therein and to move to correct the caption of the case.

It is further ordered by the Court that this case be set down for hearing on the merits after the briefs have been filed.

Per Curiam.

Dated: Apr. 16, 1953.

344 In United States Court of Appeals

[File endorsement omitted.]
[Title omitted.]

Motion to join as petitioner and correct caption

(Filed May 5, 1953)

Comes now Sinclair Weeks, Secretary of Commerce, by his attorney of record, and moves the Court that he be joined as petitioner in the above entitled proceeding and that the caption of this proceeding be corrected to read "Sinclair Weeks, Secretary of Commerce, Chairman of the United States Maritime Commission; Petitioners v. California Eastern Line, Inc., Respondent."

Reorganization Plan No. 21 of 1950 was effective May 24, 1950 (64 Stat. 1273; 46 U. S. C. A. App. 1111). This plan abolished the United States Maritime Commission including the offices of the members of the Commission and the Chairman thereof and transferred all of the functions of the United States Maritime Commission and of the Chairman of the United States Maritime Commission pertinent hereto to the Secretary of Commerce. Re-

organization Plan No. 21 of 1950, *supra*, was promulgated under the authority of Reorganization Act of 1949 (63 Stat. 206; 5 U. S. C. A. 133z et seq). It is believed that the proper exercise of the powers of this Court as well as the full protection of
345 the interest of all parties concerned, makes the appearance here, of Sinclair Weeks, Secretary of Commerce as a party to this proceeding desirable and necessary (see opinion of this Court dated April 16, 1953).

Respectfully submitted.

WARREN E. BURGER,
Assistant Attorney General.
EDWARD H. HICKEY,
Attorney,
FREDERICK N. CURLEY,
Attorney,
JAMES H. PRENTICE,
Attorney,
Department of Justice.

346 [Certificate of service omitted in printing.]

347 In United States Court of Appeals

[File endorsement omitted.]

[Title omitted.]

Before: CLARK, PRETTYMAN, and WASHINGTON, Circuit Judges, in Chambers.

Order granting motion of Sinclair Weeks, etc.

(Filed May 28, 1953)

Upon consideration of the motion of Sinclair Weeks, Secretary of Commerce, that he be joined as petitioner in the above entitled case and to correct the caption of this case in conformity with the opinion of this Court entered herein April 16, 1953, and of respondent's objections thereto, it is

Ordered by the Court that the motion of Sinclair Weeks, Secretary of Commerce, be granted and that the caption of this case be, and it is hereby, changed to read as follows:

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR TO THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Dated: May 28, 1953.

Per Curiam.

348 In United States Court of Appeals for the District of Columbia Circuit

[File endorsement omitted.]

No. 11448

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

On petition for review of decision of the Tax Court of the United States

(Decided January 21, 1954)

Mr. Frederick N. Curley, Attorney, Department of Justice, with whom Mr. Edward H. Hickey, Attorney, Department of Justice, was on the brief, for petitioners.

Mr. Harold B. Finn, pro hac vice, by special leave of Court, with whom Mr. Robert E. Kline, Jr., was on the brief, for respondent.

Before CLARK, PRETTYMAN and WASHINGTON, Circuit Judges.

Opinion—filed January 21, 1954

PRETTYMAN, Circuit Judge: This is a petition to review a decision of the Tax Court of the United States in a renegotia-
349 tion case. California Eastern Line, Inc., respondent here, was the owner of the American steamship "Vermont". In 1941 it entered into a written contract signed by the British Ministry of War Transport as the other party. Under the contract the vessel was used to transport cargo from New York to Sudan, in the Red Sea range. Respondent company received payment for the service. In 1949 the Chairman of the Maritime Commission entered an order determining that the company had realized excessive profits under the contract and proposing to renegotiate the contract. Thereafter he determined that the company had derived $164,000 of such profits within the meaning of the Renegotiation Act.[1] The company appealed to the Tax Court of the United States, which made extensive and detailed findings of fact and rendered an exhaustive opinion. It found as a fact that "The charter of the Vermont was neither a contract with the

[1] 56 Stat. 245 (1942), as amended, 50 U. S. C. A. App. § 1191.

Commission or with any other department named in the Renegotiation Act, nor a subcontract under such a contract." [2]

The Renegotiation Act [3] empowers renegotiation of "the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor". The statute defines the word "Department" thus: [4]

> The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

350 Upon the basis of its findings of fact, as above indicated, and these provisions of the statute, the Tax Court determined: "* * * we have been unable to conclude that this contract is covered by the statute." It ordered and decided that "there is no renegotiable contract within Section 403 (c) (1) of the Renegotiation Act." The present petition for review followed.[5]

The first question is whether this court has jurisdiction to review the decision of the Tax Court in this matter. The statute [6] provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." This court has held several times that in renegotiation cases it can review decisions of the Tax Court in respect to jurisdictional and Constitutional questions only.[7]

In 1945 this court had before it a renegotiation case which was strikingly similar to this one.[8] The evidence in the present case is more extensive but the basic facts, *i. e.*, the contract, the
351 signatories, the performance, are identical in all material respects. The Waterman Steamship Corporation was the owner of steamships and chartered some of them by contract signed by the British Ministry of War Transport. The Maritime Com-

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[2] 17 T. C. 1325 (1952).

[3] 56 Stat. 983 (1942), as amended, 50 U. S. C. A. App. § 1191 (c) (1).

[4] 57 Stat. 348 (1943), as amended, 50 U. S. C. A. App. § 1191 (*e*) (1).

[5] After the filing of the petition Government counsel moved to remand to the Tax Court. This motion was denied. Chairman of U. S. Maritime Comm'n v. California Eastern Line, 92 U. S. App. D. C. ——, 204 F. 2d 398 (1953).

[6] 58 Stat. 86 (1944), 50 U. S. C. A. App. § 1191 (e) (1).

[7] *E. g., U. S. Electrical Motors* v. *Jones*, 80 U. S. App. D. C. 329, 153 F. 2d 134 (1946); *Psaty & Fuhrman* v. *Stimson*, 87 U. S. App. D. C. 47, 182 F. 2d 985 (1950); *Lowell Wool By-Products Co.* v. *War C. P. A. Bd.*, 89 U. S. App. D. C. 281, 192 F. 2d 405 (1951); *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Bd.*, 90 U. S. App. D. C. 218, 195 F. 2d 198 (1951).

[8] *Waterman S. S. Corporation* v. *Land*, 80 U. S. App. D. C. 167, 151 F. 2d 292 (1945).

mission proposed to renegotiate the profits realized by the company on those contracts. The company maintained that the contracts were with a foreign government and therefore not subject to renegotiation. The company forthwith brought a civil action in the District Court seeking an injunction or a declaratory judgment. The District Court dismissed the action, on the ground that the company had not exhausted its administrative remedies. On appeal to this court the company argued as its first point that the charters were not charters with the Commission or with any department of the United States Government and that accordingly there was no statute which authorized their renegotiation. This court held that the question thus presented was jurisdictional and that, if there was no law compelling renegotiation of the contracts, the company was entitled to invoke the Declaratory Judgment Act. The court thereupon went into an extensive examination of the question as to whether the contract was a contract with the Commission or was a contract with a foreign government and concluded by remanding the case to the District Court for consideration of that one question. The Supreme Court granted *certiorari* and in the course of its opinion wrote as follows:

> Just as in the Myers case [303 U. S. 41], the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the Myers case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A con-
> 352 tractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403 (e) (1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * *" Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and

> law, which latter include the issue raised here of whether the contracts in question are subject to the Act."[9]

The Court went on to say: "Whether it [the District Court] ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination." The Court reversed this court upon the ground that the company had not exhausted its administrative remedies.

It is argued to us that the long passage which we have quoted was *dictum*. Whether it was or was not, we think we cannot disregard it. The problem now before us is precisely the problem involved in that discussion. The Court said without qualification that what are and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this court has no jurisdiction to review the decision of the Tax Court upon the question whether the contract in controversy was or was not renegotiable. We do not understand the Supreme Court to have foreclosed review if requirements of due process were allegedly violated, but we do not have that question before us.

353

We discussed the Waterman case briefly in Lowell Wool By-Products Co. v. War C. P. A. Bd.[10] and, in respect to the rule as we saw it, said:

> We think that a question whether a certain contract is within those to be renegotiated is a question of coverage, but that a question whether the Board has any power whatever over a particular company, apart from the nature of its contracts, is a question of jurisdiction.

The Government argues that in a later case[11] the Supreme Court, discussing the Waterman case, said: "The Waterman Corporation had contracted directly with a government agency, the Maritime Commission." This sentence, says the Government, was a conclusive finding upon the point in dispute in the Waterman case and also in the case at bar. But we think the Supreme Court did not intend that this one sentence, in the midst of a discussion of the Waterman case for other purposes, should constitute a final and conclusive finding of fact in a case which was not then before the Court and as to which it had no record, and

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[9] *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540, 544, 90 L. Ed. 839, 66 S. Ct. 712 (1946).

[10] 89 U. S. App. D. C. 281, 283, 192 F. 2d 405, 407 (1951).

[11] *Aircraft & Diesel Corp. v. Hirsch*, 331 U. S. 752, 766, 91 L. Ed. 1796, 67 S. Ct. 1493 (1947).

particularly where the Court had held that the Tax Court must make the initial finding of that precise fact.

It follows from the foregoing that this petition for review must be dismissed for lack of jurisdiction. If it were determined that the question of the renegotiability of this contract went to the jurisdiction of the Tax Court and thus could be reviewed by this court, we would have to review the rulings of the Tax Court upon the subsidiary questions which went to make up its
354 ultimate conclusion that it had jurisdiction. In that event we would review those questions on the same basis as we would review the record of a District Court proceeding.[12] Those questions as to which the petitioners allege error have been argued to us. Petitioners complain of the refusal of the Tax Court to admit in evidence a document purporting to be an official statement on the part of the British government.[13] They also claim error on the part of the Tax Court in various conclusions surrounding the negotiation and execution of the contract in dispute and concerning transactions which occurred pursuant to the contract. Petitioners further say that the Tax Court erred in the inferences which it drew from the clauses of the contract. We do not reach these contentions, as we lack jurisdiction of the question to which they are subsidiary.

Petition dismissed.

355 In United States Court of Appeals for the District of Columbia Circuit

January Term, 1954

No. 11448

[File endorsement omitted.]

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[12] *Cf.* Sec. 1141 (a), Int. Rev. Code, 26 U. S. C. A. § 1141 (a); *U. S. Electrical Motors* v. *Jones*, 80 U. S. App. D. C. 329, 331, 153 F. 2d 134, 136 (1946).

[13] We note that the Tax Court does seem to have taken a look at the British statement, and Judge Raum, who wrote the opinion, observed that even upon that basis the Government did not establish its point.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

On Petition for Review of Decision of The Tax Court of the United States.

Before CLARK, PRETTYMAN, and WASHINGTON, Circuit Judges.

Judgment

(Filed January 21, 1954)

This case came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition for review in this case be, and the same is hereby, dismissed for lack of jurisdiction.

Dated: January 21, 1954.

Per Circuit Judge Prettyman.

356 In United States Court of Appeals

[File endorsement omitted.]
[Title omitted.]

Order extending time for filing petition for rehearing en banc

(Filed February 23, 1954)

On consideration of the petitioners' motion for an extension of time within which to file petition for rehearing in banc herein, and it appearing that the said petition was lodged with the Clerk, and it further appearing that the respondent has not filed objections to this motion, it is

Ordered by the Court that the motion be granted and that the Clerk be, and he is hereby, directed to file forthwith the aforesaid petitioners' petition for rehearing in banc.

Per Curiam.

Dated: February 23, 1954.

357 In United States Court of Appeals

Docket entry of filing of petition for rehearing en banc

* * * * * * *

2-23-54 Per Curiam order directing Clerk to file forthwith petitioners' petition for rehearing in banc.
2-23-54 25 copies petitioners' petition for rehearing in banc.
2-23-54 Certificate of service of petitioners' petition for rehearing.

* * * * * * *

358 In United States Court of Appeals

[File endorsement omitted.]
[Title omitted.]
Before: STEPHENS, Chief Judge, and EDGERTON, CLARK, WILBUR K. MILLER, PRETTYMAN, BAZELON, FAHY, WASHINGTON, and DANAHER, Circuit Judges, in Chambers.

Order denying petition for rehearing en banc

(Filed March 12, 1954)

Upon consideration of petitioners' petition for a rehearing in banc, and of respondent's answer thereto, it is
Ordered by the Court that the aforesaid petition for a rehearing in banc be, and it is hereby, denied.

Per Curiam.

Dated: March 12, 1954.
Chief Judge Stephens did not participate in the foregoing order.

359-360 [Designation of record filed July 22, 1954, omitted in printing.]

361 [Clerk's certificate to foregoing transcript omitted in printing.]

362–365 Supreme Court of the United States

[Title omitted.]

Order extending time to file petition for writ of certiorari

(Filed May 28, 1954)

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 9, 1954.

EARL WARREN,
Chief Justice of the United States.

Dated this 29th day of May 1954.
[File endorsement omitted.]

366 Supreme Court of the United States

No. 263

October Term, 1954

[Title omitted.]

Order allowing certiorari

(Filed October 14, 1954)

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.
And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1954

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No. — 263

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HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States and the Secretary of Commerce, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on January 21, 1954.

OPINIONS BELOW

The opinion of the Court of Appeals deferring action on the jurisdictional question (App. A. 4a-16a) is reported at 204 F. 2d 398; its subsequent

opinion holding that it lacked jurisdiction (App. A. 21a-29a) is reported at 211 F. 2d 635. The opinion of the Tax Court (R. 278-302) is reported at 17 T. C. 1325.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1954 (App. A. 30a). The timely motion of the United States and the Secretary of Commerce for rehearing *en banc* was denied on March 12, 1954 (App. A. 31a-33a). By order of the Chief Justice, dated May 29, 1954, the time for filing a petition for a writ of certiorari was extended to and including August 9, 1954 (App. A. 33a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether under the Renegotiation Act of 1942, as amended, the Court of Appeals for the District of Columbia Circuit has authority to review a determination by the Tax Court in a renegotiation case that a contract is not renegotiable because it was not made with the United States.

STATUTE INVOLVED

The pertinent provisions of the Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U.S.C. App. 1191 *et seq*) are set forth in Appendix B, *infra*, pp. 34a-38a.

STATEMENT

The facts pertinent to the issue here raised may be briefly summarized as follows:

During April and May of 1941, the Maritime Commission, at the request of the President and in an effort to coordinate shipping in the furtherance of the national defense effort, assembled 2,000,000 tons of merchant shipping (R. 234, 279). Because of the shortage of available ships, the Commission, in order to accomplish this task, assembled the required tonnage from intercoastal ships (R. 44). Included among the intercoastal ships so assembled was respondent's vessel, VERMONT (R. 44).

At that time, the British Government requested from the United States, under the Lend-Lease program, shipping facilities which it needed to transport war equipment and supplies for its North African campaign. Pursuant to this request, the President authorized the Maritime Commission to negotiate with various shipowners, including representatives of respondent, in order to secure the necessary tonnage for this operation.[1] After numerous conferences during April and May 1951, Commission officials and the shipowners worked out the terms under which the VERMONT and other vessels were to be chartered for the Red Sea operation, including the charter rates which the owners were to be paid.

During the course of the negotiations between the Commission officials and the shipowners, it was understood by all the negotiating parties, including

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[1] This operation ultimately became known as the "Red Sea operation" because of the ultimate destination of the vessels. Cf. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 542.

respondent, that the British Government would probably be the formal charterer under the charters for this Red Sea operation (R. 284) and respondent's charter was actually signed by the British Ministry of War Transport (R. 24). Neither the British Government nor any of its agencies or representatives, however, took part in the negotiations with the shipowners on the terms of the charter of the VERMONT or the other ships for the Red Sea operation (R. 284) and the charter was not formally executed by a British Ministry of War Transport representative until after the sailing of the VERMONT for Port Sudan on May 29, 1941 (R. 284-285). The Commission paid all bills and other obligations which arose under this charter directly to the shipowners from funds appropriated by the Congress of the United States (R. 105, 135, 143, 151), and the British Government did no more than certify to the Commission that the charter services had been performed (R. 134, 142, 150).

Full performance under respondent's charter was not completed until after April 28, 1942, the date on which Congress enacted the Renegotiation Act, 56 Stat. 245; 50 U.S.C. App. 1191. In accordance with the terms of this Renegotiation Act, as amended, the Chairman of the United States Maritime Commission, on November 27, 1943, commenced renegotiation proceedings with respondent in an effort to eliminate the excessive profits which respondent had realized from its Red Sea venture (R. 51-53). On March 31, 1949, a unilateral rene-

gotiation order was issued determining that respondent had received $161,000 in excessive profits from its charter (R. 15-16).[2]

Respondent petitioned the Tax Court for redetermination of its excessive profits under Section 403(e)(2) of the Renegotiation Act, as amended, *infra,* pp. 37a-38a (R. 4-14). Thereafter, it moved the Tax Court to consider first, from among the various issues raised by its petition, the issue whether its Red Sea contract was subject to renegotiation. This issue turns on whether respondent's charter, although formally executed by the British Ministry of War Transport, was in fact with the Maritime Commission and so a renegotiable contract with a "Department" under Section 403(a) of the Renegotiation Act, as amended, *infra,* p. 34a. The Tax Court granted this motion (R. 38),[3] and after a hearing on this issue,[4] the court concluded,

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[2] The delay in issuing this order was attributable, in some measure, to the institution of judicial proceedings by some of the shipowners, including respondent (R. 27), who sought to enjoin the administrative proceedings on the ground that the charters were not subject to renegotiation. This effort came to nought when this Court held that the failure to exhaust administrative remedies precluded judicial consideration of the issues attempted to be raised. *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540.

[3] As a result of this severance, no issue as to the amount of excessive profits was presented to the Tax Court; the questions presented were restricted to a consideration of the jurisdiction of the Maritime Commission and the Tax Court to subject respondent's Red Sea charter to renegotiation.

[4] The Tax Court excluded from evidence (R. 277, 297) an Official Statement of the British Government, which petitioners had received through official government and diplomatic channels, to the effect that when a representative of the British

one judge dissenting, that the charter was with the British Ministry of War Transport and not with the Commission, and therefore was not subject to renegotiation under the Act (R. 278-302).

Relying on prior decisions of the District of Columbia Court of Appeals (see *infra*, pp. 9, 16-20), the Government filed a petition in that court (under Section 1141 of the Internal Revenue Code, 26 U.S.C. 1141) for review of the Tax Court's determination that respondent's Red Sea charter was not renegotiable (R. 302-305). Respondent moved to dismiss the petition on the ground that the court was without jurisdiction to pass on this issue (App. A. 2a). After hearing argument on this motion, the court deferred decision thereon until the hearing on the merits (App. A. 16a, 17a).[5] After further argument, the panel of the court sitting on the case

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Government executed the charter it was understood "that His Majesty's Government in signing said charters were agents only and that the principal and real party in interest was the United States Government as represented by the United States Maritime Commission" (R. 272). This ruling appears to be contrary to *Ex parte State of New York*, 256 U.S. 503, and other persuasive rulings.

[5] The court simultaneously denied the Government's motion to remand the cause to the Tax Court with instructions to vacate its decision on the ground that since Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 46 U.S.C. 1111, note) had abolished the position of the Chairman of the Maritime Commission, the named respondent in the Tax Court and had transferred his functions to the Secretary of Commerce, the proceeding had abated with respondent's failure to make timely substitution (App. A. 1a, 3a-17a). However, the court went on to rule that, since the Secretary of Commerce had failed to appear in the proceeding before it, there might be an absence of proper parties, and allowed time for him to appear (App. A. 11a-16a, 17a). In accordance with this ruling, the

(Clark, Prettyman and Washington, J. J.) held that it lacked jurisdiction to pass on the question. Quoting from this Court's opinion in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544[6] the opinion, written by Judge Prettyman, concluded (App. A. 27a):

> The problem now before us is precisely the problem involved in that discussion. The

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Government moved to substitute the present petitioners for the Chairman of the Maritime Commission, which motion was granted (App. A. 18a-21a).

[6] The *Waterman* language quoted by Judge Prettyman is as follows (see App. A. 25a-26a):

> Just as in the *Myers case* [303 U.S. 41], the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403 (c) (1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . ." Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act.

> Court said without qualification that what are and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this court has no jurisdiction to review the decision of the Tax Court upon the question whether the contract in controversy was or was not renegotiable.

Petitioners' petition for rehearing by the Court of Appeals in banc was denied (App. A. 32a-33a).

REASONS FOR GRANTING THE WRIT

The crux of this case is that one panel of the Court of Appeals for the District of Columbia Circuit has denied the Government review of an adverse Tax Court renegotiation ruling—on the ground that the ruling pertained to "coverage" rather than "jurisdiction", and was therefore unreviewable—while other panels of the same court have in the past and will apparently continue to entertain contractors' appeals on similar issues as raising questions of "jurisdiction" rather than "coverage". All appropriate avenues of relief within the Court of Appeals have been exhausted, and only this Court can now afford a remedy. Since the matter is important, involving the renegotiability of the well-known "Red Sea charters",[7] we feel warranted in invoking the Court's super-

[7] There are twelve other "Red Sea charter" cases pending in the Tax Court. See, *infra*, p. 21.

visory authority to untangle the judicial net in which the Government finds itself enmeshed.

1. The District of Columbia Circuit has, over the Government's initial opposition, repeatedly insisted that it has power to review Tax Court renegotiation decisions on constitutional and "jurisdictional" grounds. *E. g., U. S. Electrical Motors, Inc.* v. *Jones,* 153 F. 2d 134; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board,* 192 F. 2d 405; *Armstrong* v. *War Contracts Price Adjustment Board,* 194 F. 2d 875, certiorari denied, 343 U. S. 967; *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board,* 177 F. 2d 727, certiorari denied, 339 U. S. 912; *Ring Construction Corp.* v. *Secretary of War,* 178 F. 2d 714, certiorari denied, 339 U. S. 943; see the Memorandum for Respondent in Opposition, *Martin Wunderlich Co.* v. *Secretary of War,* No. 666, Oct. Term, 1952; see, also, *infra,* pp. 16-20. Since the great bulk of the decisions in this field are by the District of Columbia Court of Appeals,[8] and the law in that court had become so firmly established by frequent reiteration and application, the Government sought review of the Tax

[8] The exceptions are two Ninth Circuit decisions (*French* v. *War Contracts Price Adjustment Board,* 182 F. 2d 560, and *Warner* v. *War Contracts Price Adjustment Board,* 188 F. 2d 363), in which that Court of Appeals held that 403(c)(1) of the Renegotiation Act, as amended, *infra,* pp. 36a-37a, foreclosed appellate review of Tax Court decisions. However, that court seems to suggest that Tax Court determinations may be collaterally attacked on grounds similar to those recognized by the District of Columbia Court of Appeals, in the district court suits brought by the Government to recapture the excessive profits.

Court's determination that the Red Sea charters were not renegotiable. As we show in detail below (*infra*, pp. 16-20), the appellate court's previous rulings on comparable issues justified the Government in believing that the issue was "jurisdictional" and therefore reviewable.

Nevertheless, in this instance—the first in which the Government has invoked the court's asserted jurisdiction—the three-judge panel hearing the case departed from the court's heretofore consistent position by holding that the renegotiability *vel non* of the charters is a question of "coverage" within the non-reviewable jurisdiction of the Tax Court. The result is an unequal application of the law which precludes appellate scrutiny of the most important decision against the Government rendered by the Tax Court under the Renegotiation Act.[9]

The sense of disparate treatment is heightened by the fact that this panel's limited view of the scope of reviewability of Tax Court determination does not appear to be shared, even now, by

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[9] It is also worthy of note that in *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, the only other renegotiation appeal by the Government which is pending in that court, the District of Columbia Circuit, after first holding that it had power to review (see 345 U.S. 950), later held that the issue of timely commencement of renegotiation is non-jurisdictional and not reviewable. The court expressly overruled that phase of its decision in *Blanchard Machine Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U.S. 912, in which it had held, on a contractor's appeal, that the issue was jurisdictional and reviewable.

a number of the other judges comprising the District of Columbia Court of Appeals.[10] Not only was a broader review accorded to the contractors in the court's prior decisions (*infra*, pp. 16-20)—decisions which the instant panel does not undertake expressly to overrule—but subsequent to the decision here other panels, considering three other Tax Court renegotiation cases (appealed by the contractors) involving similar issues of contract renegotiability, expressed strong doubts, in oral argument, as to the correctness of the result in this case and indicated that they might well reach a conflicting conclusion on that issue. *Estate of Robert I. Gale et al.* v. *United States of America*, C. A. D. C. No. 11906 (argued April 14, 1954, before Edgerton, Miller, and Bazelon, JJ.); *Hanlon-Waters, Inc.* v. *United States*, C. A. D. C. No. 11934 (argued May 12, 1954, before Miller, Bazelon, and Fahy, JJ.); *Jacob Lichter, et al.* v. *United States of America, et al.*, C. A. D. C. No. 11925 (argued May 12, 1954, before Miller, Bazelon, and Fahy, JJ.).

To await, if possible, the decisions in those cases and the development of this potential intra-circuit conflict, the Government sought an extension of time for filing a petition for a writ of certiorari in this case until August 9, 1954, the maximum of sixty

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[10] Although the Government's petition for rehearing *en banc* was denied, the District of Columbia Court of Appeals frequently denies such petitions for reasons other than the correctness of the decision. Cf. Stephens, *Shop Talk Concerning the Business of the Court*, 20 D.C. Bar Association Journal 103, 105-109.

days permitted by 28 U. S. C. 2101(c).[11] However, no decision has yet been issued in any of these subsequently argued cases. Since no further extension of time is permissible, the only practical way open to the Government to insure equality of treatment under the rules prevailing in the District of Columbia Court of Appeals is through review by this Court.

2. Moreover, the opinion below misapplies this Court's language in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544. As noted, *supra*, pp. 7-8, the court reads the *Waterman* language as holding in effect that a determination by the Tax Court as to the renegotiability of a contract is non-reviewable. But when read in context and in conjunction with later decisions of this Court, the *Waterman* opinion plainly does not pass upon this question and consequently does not support the conclusion below, much less require it. Indeed, far from passing upon the issue, this Court has gone out of its way in its decisions expressly to reserve the question.

The *Waterman* case did not involve an attempted review of a Tax Court decision; the administrative proceedings which are necessary preliminaries to

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[11] In view of these circumstances, the Court may deem it appropriate to withhold action upon this petition until the issuance of opinions in one or more of the three pending cases. Should an intra-circuit conflict formally develop, the Court may wish to remand the case to the court below for an *en banc* resolution of the conflict. Cf. *Western Pacific Railroad Corp* v. *Western Pacific Railroad Co.*, 345 U.S. 247, 270 (opinion of Mr. Justice Frankfurter), 274 (dissenting opinion of Mr. Justice Jackson).

instituting suit in the Tax Court had not even been completed. The purpose of the district court action brought by the shipowner in that case was to obtain (1) a declaratory judgment that his Red Sea charters, similar to the present charter, were not renegotiable and (2) an injunction prohibiting the continuation of the administrative proceedings. As a result, the sole issue before this Court was whether the district court has jurisdiction to grant the relief prior to the termination of the administrative proceeding. In holding that the district court lacked jurisdiction, this Court declared (327 U. S. at 544-5), immediately following the excerpt quoted by the court below (App. A, *infra*, pp. 25a-26a):

> * * * In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the *Myers* case [*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41], the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act.

Thus, this Court's reference, stressed in the opinion below, to questions of coverage being within the exclusive jurisdiction of the Tax Court was con-

cerned solely with delineating the matters committed to the original jurisdiction of the Tax Court to the exclusion of the district courts, and was not intended to treat the scope of review once the Tax Court had made its determination. The fundamental error in the opinion below is its reading of "exclusive", as used in *Waterman*, as necessarily synonymous with "unreviewable".

That this Court in *Waterman* intended to pass only on the jurisdiction of a district court to grant relief prior to the termination of the administrative proceedings, and not on the scope of review of Tax Court determinations, is further demonstrated by the Court's subsequent decisions in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, and *Lichter* v. *United States*, 334 U. S. 742, decisions which the opinion below completely overlooks. *Aircraft & Diesel*, like *Waterman*, involved a district court suit by a contractor seeking a declaratory judgment and injunction but in circumstances where the administrative proceeding had been completed and a petition for redetermination was pending in the Tax Court. Again holding that the district courts were without jurisdiction to entertain such a suit, this Court, in addition to explaining the *Waterman* case as involving solely the principle of exhaustion of administrative remedies (331 U. S. at 755), expressly distinguished between the statutory provision conferring exclusive original jurisdiction upon the Tax Court (*vis a vis* the district courts) in renegotiation matters and the provision concerning the finality of Tax Court de-

cisions (331 U. S. at 768-769). As to the scope of the latter, the Court unequivocally stated (331 U. S. at 771):

> We do not express any opinion, indeed we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters.[12]

And in *Lichter*, where defendant contractors sought to resist the suits brought by the Government in the district court to recapture excessive profits as determined by the appropriate renegotiating agencies on the ground that such determinations were invalid, this Court, at the same time that it reaffirmed *Waterman* and *Aircraft & Diesel* by

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[12] The Court's opinion goes on (331 U.S. at 771):

> We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose. Nor need we become involved in an attempt to decide what particular questions it might have left, or did leave, for that body's final and conclusive disposition. For it seems obvious, in view of the Act's terms, history, objects and the policies incorporated, that Congress clearly and at the very least intended the Tax Court's functions not only to be put in motion but to be fully performed, before judicial intervention should take place at the instance of one in appellant's position.
>
> This indeed was the ruling of the *Waterman* case. And we do not think the effect of that ruling is exhausted simply because constitutional questions were not raised there, but have been put forward in this cause. Nor is it overcome, in our judgment, by the showing which has been made on this record of irreparable injury and of the need as well as the power of equity to forestall the complete operation of the congressionally prescribed procedure.

sustaining the exclusiveness of the Tax Court remedy, again distinguished the question of the finality of such Tax Court decisions and explicitly noted that it was not passing on that issue (334 U. S. at 791):

> No petitions were filed with the Tax Court in any of the cases before us, and the time for doing so has expired. Accordingly, here, as in *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 771, we do not have before us, and we do not express an opinion upon, the finality which would have attached to a redetermination by the Tax Court if such a redetermination had been sought and made. We have only the situations presented by the respective failures of the petitioners to resort to the Tax Court in the face of the express statutory provisions made for such administrative relief.

It is thus plain that, contrary to the opinion below, this Court in *Waterman* and subsequent cases has merely affirmed the requirement of exhaustion of administrative remedies and has not defined the "finality" to be accorded Tax Court determinations. In these circumstances, the reading into *Waterman* by the panel below of a holding that a Tax Court determination as to contract renegotiability is non-reviewable is without justification.

3. The decision below similarly reflects a failure to appreciate the full impact of the prior rulings of the District of Columbia Court of Appeals. While the opinion recognizes that "[t]his court

has held several times that in renegotiation cases it can review decisions of the Tax Court in respect to jurisdictional and Constitutional questions only" (App. A, *infra*, p. 24a),[13] it overlooks the fact that in a number of these cases the court has also held that issues which are the same as, or comparable to, that here involved were "jurisdictional" and so reviewable. Cf. Davis, *Unreviewable Administrative Action*, 15 F. R. D. 411, 433, 443-444.

Thus, *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405, concerned the issue whether two companies were "un-

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[13] The District of Columbia Court of Appeals has set out its rationale for exercising authority to review such questions in a number of cases. See, *e.g.*, *U. S. Electrical Motors Inc.* v. *Jones*, 153 F. 2d 134, 136-137; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405, 407; first opinion in instant case, App. A, *infra*, pp. 12a-14a. For example, in the *Electrical Motors* case, the court stated (153 F. 2d at 136-137):

> Respondents argue that the Renegotiation Act forbids judicial review of any act of the Tax Court in a renegotiation case. The Act does not so read. It very carefully says that the Tax Court shall have exclusive jurisdiction to determine the amount of excessive profits. It leaves untouched, by direct reference or otherwise, the remaining content of Section 1141(a) of the Internal Revenue Code. We think, therefore, that the statute places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination, but that a ruling upon the jurisdiction of the Tax Court is untouched by that provision and, therefore, remains reviewable by this court. It would, we think, require clear language to indicate that Congress intended that any tribunal should have unreviewable authority to determine its own jurisdiction.

der common control" for the purpose of applying the $500,000 war-business floor provision of Section 403(c)(6) of the Renegotiation Act, *infra*, p. 35a. The Court of Appeals held that the issue was one of "jurisdiction", subject to review (192 F. 2d at 407):

> * * * it is enough to say that in our opinion the determination that petitioner and Nichols & Co., Inc., were under common control was a determination of jurisdiction. It is clear that the finding of common control was requisite to the right of the Board to renegotiate any profits of this petitioner Company.

Although the *Lowell Wool* opinion appears, by way of dictum, to regard "common control" as on a different plane for purposes of judicial review than the "question whether a certain contract is within those to be renegotiated" (192 F. 2d at 407), the distinction between the two concepts does not, under the rationale of *Lowell Wool* and other District of Columbia Circuit cases, justify a different result in the present case. A finding of contract renegotiability, like one of common control, is requisite to the agency's right to renegotiate any profits, particularly where, as here, the Government relies on only one contract with respondent to establish its right to recapture excessive profits.[14]

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[14] It may be noted in passing that *Waterman* is discussed only in *Lowell Wool* and the instant case, although subsequent to *Waterman* the court below issued some 12 decisions on this general question. (Both the *Lowell Wool* and the instant opin-

And in the later case of *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875 (C. A. D. C.), certiorari denied, 343 U. S. 967, the court held "jurisdictional" the question whether a salesman receiving commissions on sales by steel companies under contracts or subcontracts with the Government was a "subcontractor" as defined in Section 403(a)(5)(B) of the Renegotiation Act, *infra*, p. 34a. We cannot distinguish the *Armstrong* case from the present problem of whether respondent was a contractor with the United States.[15]

The prior rulings of the court also accord with the view that it has competence to review issues of contract renegotiability. In *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714 (C.A. D.C.), certiorari denied, 339 U. S. 943, it held reviewable not only the constitutionality of the Renegotiation Act, as applied to contracts entered into prior to its enactment, but also the issue of whether such contracts were covered by the Act, *i.e.*, their renegotiability under the Act as a matter of statutory interpretation. See 178 F. 2d at 715. Similarly, in *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d

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ions were written by Prettyman J., and Washington J. was one of the other members of the panel.) And while *Lowell Wool* seems to read *Waterman* as holding contract renegotiability to be an issue within the nonreviewable jurisdiction of the Tax Court, it also expressly recognizes that *Waterman* "rested upon failure to exhaust administrative remedies, and the Court, by one or two expressions, reserved decision upon the question of subsequent judicial review" (192 F. 2d at 407).

[15] The opinion below does not refer to the *Armstrong* case.

727 (C. A. D. C.), certiorari denied, 339 U. S. 912 and *Eastern Machinery Co. v. Under Secretary of War*, 182 F. 2d 99 (C. A. D. C.), the court reviewed as "jurisdictional" the renegotiability, under the 1943 amendment to the Act, of certain contracts with Reconstruction Finance Corporation subsidiaries completed prior to the amendment's enactment. One of the issues reviewed in each of these cases thus involved contract renegotiability, issues which are indistinguishable from that presented here.

4. In addition to curing the unfortunate position in which the Government finds itself in the court below, a ruling by this Court would establish uniform principles under which the more than 100 renegotiation cases still pending before the Tax Court under the Renegotiation Act of 1942, as amended, would be reviewable, if at all, by the courts of appeals. In this connection, it is also significant that although the Renegotiation Act of 1942, as amended, has expired, the pertinent provision of Section 403(e) has been re-enacted in Section 108 of the Renegotiation Act of March 23, 1951 (65 Stat. 7, 21-22, 50 U. S. C. App. 1218), the extension of which (H. R. 6287, 83d Cong.) is at this time awaiting Congressional action.[16] These considera-

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[16] H. R. 6287 was passed by the House on July 22, 1953. 99 Cong. Rec. 9523; see also H. Rep. No. 860, 83rd Cong., 1st Sess. Subsequently, it was reported out favorably with amendments by the Senate Finance Committee (S. Rep. No. 643, 83rd Cong. 1st Sess.) and it is now on the Senate Consent Calendar awaiting to be called up for Senate consideration. Its passage

tions, plus the significant fact that the Tax Court's determination here will be dispositive for all practical purposes of the twelve additional Red Sea charter cases pending in the Tax Court and involving more than $7,000,000 in excessive profits,[17] indicate the appropriateness of review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

AUGUST, 1954.

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was recommended strongly by President Eisenhower in the State of the Union Message, H. Doc. 251, 83rd Cong., 2d Sess.; 100 Cong. Rec. 62, 65 (unbound ed.).

[17] In all, there were 93 Red Sea voyages by 22 shipowners, of whom 7 voluntarily repaid excessive profits of more than $3,000,000. As to the remaining two shipowners, it was administratively determined that their profits had not been excessive.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER ON REVIEW,

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT ON REVIEW

MOTION TO REMAND TO THE TAX COURT WITH INSTRUCTIONS TO THAT COURT TO VACATE ITS DECISION AND DISMISS THE PETITION

Comes now the Petitioner on review and moves the Court to remand this case to the Tax Court of the United States with instructions to the Tax Court to vacate its decision and opinion and to dismiss the petition for the reason that the Tax Court of the United States lacked jurisdiction because of the failure of the Respondent on review to substitute the Secretary of Commerce for the Chairman of the United States Maritime Commission as required by the Reorganization Act of 1949 and Reorganization Plan No. 21, of 1950.

Respectfully submitted,

s/ HOLMES BALDRIDGE,
Assistant Attorney General.
EDWARD H. HICKEY,
FREDERICK N. CURLEY,
JAMES H. PRENTICE,
Attorneys, Department of Justice.

United States Court of Appeals for the District of Columbia Circuit. Filed July 18, 1952. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER,

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

MOTION TO DISMISS PETITION FOR REVIEW

Comes now the respondent and moves the Court to dismiss the petition for review on the ground that the Court lacks jurisdiction to review or redetermine any of the errors alleged to have been committed by the Tax Court, as set forth in the petition for review, none of which involves a constitutional or jurisdictional question.

Respondent submits the annexed memorandum in support of its motion.

Respectfully submitted,

CLETUS KEATING,
HAROLD B. FINN,
s/ ROBERT E. KLINE JR.,
Attorneys for Respondent,
Munsey Building,
Washington 4, D. C.

United States Court of Appeals for the District of Columbia Circuit. Filed August 25, 1952. Joseph W. Stewart, Clerk.

Receipt of copy of above motion and attached memorandum acknowledged this 25th day of August, 1952. (S.) Frederick N. Curley, Attorney for Petitioner.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 OCTOBER TERM, 1952

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Before: CLARK, PRETTYMAN and WASHINGTON, Circuit Judges, in Chambers.

ORDER

It is ORDERED by the Court that petitioner herein show cause within 15 days why this case should not be dismissed for lack of jurisdiction on the part of this Court. See United States v. Siegel, 83 U.S. App. D.C. 88, 168 F. 2d 143 (1948); Davis v. Preston, 280 U.S. 406, 408 (1930); Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631, 638 (1949); Snyder v. Buck, 340 U.S. 15, 20 (1950). Respondent may file a reply within 15 days after petitioner's answer is filed.

Dated: December 4, 1952.

Per Curiam.

United States Court of Appeals for the District of Columbia Circuit. Filed December 4, 1952. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

ON MOTION OF PETITIONER TO REMAND TO THE TAX COURT OF THE UNITED STATES WITH INSTRUCTIONS TO VACATE DECISION AND DISMISS PETITION FOR REVIEW

Decided April 16, 1953

United States Court of Appeals for the District of Columbia Circuit. Filed April 16, 1953. Joseph W. Stewart, Clerk.

Messrs. Frederick N. Curley and *Edward H. Hickey*, Attorneys, Department of Justice, for petitioner.

Messrs. Harold B. Finn, pro hac vice, by special leave of Court, and *Robert E. Kline, Jr.* for respondent.

Mr. Joseph P. Tumulty, Jr. for Viking Corporation, *amicus curiae*, filed a memorandum urging that petitioner's motion be denied.

Before: CLARK, PRETTYMAN and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is a renego-

tiation case, in which a motion was made by Government counsel to remand the cause to the Tax Court of the United States with instructions to vacate its decision. The ground of the motion was that the position of the Government official named as respondent in the Tax Court proceeding has been abolished and the cause has abated for want of substitution of the successor to his functions.

In 1949, the Chairman of the United States Maritime Commission determined that the California Eastern Line, Inc., had made excessive profits in 1942 under an allegedly renegotiable contract. California Eastern thereupon petitioned the Tax Court for a redetermination under the Renegotiation Act, as amended, 50 U.S.C.A. App. §1191, naming the Chairman of the Maritime Commission as respondent. A hearing was held in the Tax Court in March 1951 on the question whether the contract in issue was subject to the Renegotiation Act. The Tax Court held, in February 1952, that the contract was not a renegotiable contract within the meaning of Section 403 (c)(1) of the Act. 17 T.C. 1325 (1952). On April 25, 1952, a petition for review addressed to this court was filed by Government counsel with the clerk of the Tax Court. The case was docketed in this court on June 3, 1952. On July 18, 1952, the instant motion was filed by counsel for the Government.

I

The moving papers rely on the fact that under Reorganization Plan No. 21 of 1950, which became

effective May 24, 1950, the United States Maritime Commission and the Office of its Chairman were abolished, and those functions of the Commission and of its Chairman which are relevant here were transferred to the Secretary of Commerce. 64 Stat. 1273; 46 U.S.C.A. App. §1111. The Plan was adopted pursuant to the provisions of the Reorganization Act of 1949, 5 U.S.C.A. §133z, *et seq.*, which included the following provision in Section 9:

> "No suit, action, or other proceeding lawfully commenced by or against the head of any agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of the taking effect of any reorganization plan under the provisions of sections 133z to 133z-15 of this title, but the court may, on motion or supplemental petition filed at any time within twelve months after such reorganization plan takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, allow the same to be maintained by or against the successor of such head or officer under the reorganization effected by such plan, or, if there be no such successor, against such agency or officer as the President shall designate." June 20, 1949, c. 226, Title I, §9, 63 Stat. 206; 5 U.S.C.A. §133z-7(b).

Counsel for the Government argues that since California Eastern did not file a motion or supplemental petition in the Tax Court within the twelve-month period following May 24, 1950, requesting that the action survive against the Secretary of Commerce, the cause abated and the Tax Court was without jurisdiction to render its decision.

In support of its motion, the Government urges that an appellate court can and should prevent a lower court from disregarding the principles of abatement. It contends that if a judgment has been rendered which does not give proper effect to the abatement of the cause, the appellate court should exercise its supervisory jurisdiction to require the outstanding judgment to be vacated, while on the other hand if the lower court has properly abated an action, the appellate court should allow the judgment of abatement to stand. The decisions go far toward establishing these general propositions.[1] In any event we think we must consider whether there is now outstanding an invalid judgment in an abated cause, which should be prevented "from spawning any legal consequences." *United States* v. *Munsingwear, Inc.*, *supra* note 1, 340 U.S. at 41 (1950).

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[1] *United States* v. *Seigel*, 83 U.S. App. D.C. 88, 168 F. 2d 143 (1948); *Davis* v. *Preston*, 280 U.S. 406 (1930); *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U.S. 631 (1949); *Snyder* v. *Buck*, 340 U.S. 15, 20-21 (1950); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950); and *McGrath* v. *National Association of Manufacturers*, 344 U.S. 804 (1952).

We turn, then, to the statute on which the Government relies. The Reorganization Act of 1949, in the provision above-quoted relative to abatement, speaks of a "suit, action, or other proceeding." This must mean a suit, action, or proceeding before a court, for the second clause of the provision says "the court" may allow survival. The statute's primary purpose was evidently to ameliorate the harsh consequences of the common-law abatement rules usually applicable to judicial procedings.[2] Any effect it has in causing termination of a "suit, action, or other proceeding" would appear to be secondary. Administrative proceedings, as far as we can discover, have never been held to be subject to the common-law rules of abatement. In principle they should not be, and a statute should not be interpreted as making them so subject unless the legislative intent clearly so requires. Changes in the personnel or organization of the executive branch should not be permitted, without good purpose, to delay or hinder the citizen in his dealings with any part of it.

The renegotiation proceedings had in this case were wholly administrative in nature. There could be no judicial review until after the Tax Court rendered its decision. The proceeding in the Tax

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[2] *Cf.* Defense Supplies Corp. v. Lawrence Warehouse Co., *supra*, 336 U.S. at 636-37: "The statute states categorically that 'no action shall abate' . . . If Congress states that no action shall abate, we fail to see why we should make additional language a proviso." See also Snyder v. Buck, *supra*, 340 U.S. at 19.

Court was not an adversary action: it did not require judgment against some person or agency. Rather its goal was a redetermination, following the initial executive determination, of the amount by which the contractor's profits were excessive. 50 U.S.C.A. App. § 1191(e)(1). Neither was the Tax Court proceeding a review: It is to "be treated as a proceeding de novo." *Ibid.* In such cases, the head of the agency alleging excessive profits is named as respondent, under the rules of the Tax Court. But he is named by title as an impersonal officer, not as an individual person.[3] Throughout the proceedings, whether the matter is before the primary agency or before the Tax Court, the citizen is still seeking or resisting an executive determination; the matter is still in the bosom of the executive branch. In the words of the governing statute, the Tax Court is "an independent agency in the Executive Branch of the Government," which "shall be known as The Tax Court. . . ." 26 U.S.C.A. § 1100. It has been

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[3] Rule 64-II, 26 U.S.C.A. fol. § 1111. In tax cases Rule 12 of the Tax Court requires that a copy of the petition be served upon "the Commissioner." No person is named by name. The proceeding does not abate if a Commissioner leaves office or dies. *Cf.* Rusk v. Commissioner of Internal Revenue, 53 F.2d 428 (7th Cir. 1931); 26 U.S.C.A. § 1143. Rule 64 of the Tax Court provides that in renegotiation cases the same rules apply and that when the rules say "Commissioner" they shall refer to "the Board" or "the Secretary" as used in the Renegotiation Act. It further provides that in renegotiation proceedings "the Board" or "the Secretary . . . shall be shown as the respondent."

consistently held to be not a court, but "an executive or administrative board."[4]

In renegotiation proceedings before the Tax Court, the doctrines of abatement and substitution applicable to judicial proceedings are not in our view required for the protection either of the citizen or of the Government. On the Government's side, it is the national treasury which, in any event, will ultimately gain or lose as against the citizen. And the hazard that the proper Government official may not be named as respondent under the rules of the Tax Court presents no serious difficulty. In the instant case, no affirmative relief was asked against the Chairman of the Maritime Commission in the Tax Court proceedings; the Tax Court was simply to review his order and redetermine the matters there involved. Abatement on the ground that the Chairman was no longer in office or his office no longer in existence would not bear any relation to the realities of the situation, and would defeat the ends of justice. We would not willingly reach that result unless required to do so by legislation or proper administrative rule. In the present case we find no such statutory or administrative requirement. Accordingly we deny the Government's motion to remand the cause to the Tax Court with directions to vacate its judgment.

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[4] *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.S. 716, 725 (1929); *Rusk v. Commissioner of Internal Revenue*, 53 F.2d 428 (7th Cir. 1931).

II

After argument of the Government's motion, we raised on our own initiative—and asked the parties to brief—a further jurisdictional question, based on the following facts: The petition to this court, filed on April 25, 1952, was captioned "Chairman of the United States Maritime Commission, Petitioner for Review vs. California Eastern Line, Inc., Respondent-Appellee." The petition begins by saying: "The United States of America hereby respectfully petitions for review of the Decision of the Tax Court of the United States. . . . This review is sought by the United States of America." Nothing in the petition advised this court that there was no Chairman of the United States Maritime Commission then in office, or that the functions of the Chairman had long since been transferred to the Secretary of Commerce. It was not until July 18, 1952, when the motion to remand was filed by Government counsel, that this court was advised of the facts. The Secretary of Commerce has not appeared, or sought to appear, in the cause.

On these facts, the question presented is one of jurisdiction over the parties. We hold in this case that the provisions of Section 9 of the Reorganization Act concerning abatement are inapplicable to proceedings in the Tax Court in which an agency or officer later affected by a reorganization plan is named as respondent. The same must be said of the corollary substitution provisions of that sec-

tion. The status of the present proceedings in this court is therefore not governed by the parties' failure to comply with those substitution provisions.[5] The question, rather, is whether we now have before us a justiciable controversy, between proper parties. We start with the judgment of the Tax Court validly entered insofar as any problem of abatement and substitution is concerned. Was either the "Chairman of the U. S. Maritime Commission" or the "United States of America" entitled to challenge that judgment in the courts?

The statute provides that the Tax Court shall "finally determine" the amount of excessive profits in renegotiation proceedings, and that its decision shall not be reviewable. 50 U.S.C.A. App. § 1191(e)(1). But we have held that an administrative agency cannot finally determine the extent of its own jurisdiction, and hence that judgments of the Tax Court in renegotiation cases may be examined in this court to determine whether juris-

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[5] *Cf.* Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631 (1949), in which it was held that an appellate court had no jurisdiction to review a cause on the merits where the respondent "called for review after the period given for substitution [of a Government official] had expired." 336 U.S. at 638. But in that case the statutory provisions for abatement and substitution were applicable to the proceedings in the tribunal below. The provisions of Section 9 are not applicable to the *judicial* proceedings in this case, begun after the judgment of the Tax Court was rendered and after Reorganization Plan No. 21 became fully effective. The only actions to which Section 9 applies would appear to be those "lawfully commenced by or against" a Government official who is later stripped of his relevant functions, or otherwise affected, by a reorganization plan.

dictional or constitutional limits have been exceeded.[6] Our review takes place pursuant to Section 1141 of Title 26 of the United States Code, the general statute governing review of Tax Court decisions. In a tax case brought under that section, "the Commissioner" (of Internal Revenue) may petition for judicial review, 26 U.S.C.A. § 1142, and if the office changes hands while such a case is pending before the Tax Court or an appellate court, no substitution occurs or is required.[7] In renegotiation cases, the statute is not specific on these points. Cf. *U.S. Electrical Motors* v. *Jones*, 80 U.S. App. D.C. at 332, 153 F. 2d at 137. But the statute does say, 50 U.S.C.A. App. § 1191(e)(1), that in renegotiation cases the Tax Court shall have the same "powers and duties," in respect of the parties, as it has under the Internal Revenue Code provisions governing Tax Court procedure.[8] We think it clear that procedure in tax and renegotiation cases in the Tax Court is intended to be

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[6] *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Board*, 90 U.S. App. D.C. 218, 195 F.2d 198 (1952); *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 89 U.S. App. D.C. 281, 192 F.2d 405 (1951); *U.S. Electrical Motors* v. *Jones*, 80 U.S. App. D.C. 329, 153 F.2d 134 (1946).

[7] See fn. 3, *supra*. 26 U.S.C.A. § 1143 provides that "When the incumbent of the office of Commissioner changes, no substitution of the name of his successor shall be required in proceedings pending . . . before any appellate court reviewing the action of the Tax Court."

[8] Including the section giving the Tax Court power to make rules of practice and procedure, 26 U.S.C.A. § 1111. "Commissioner," of course, is broadly defined in renegotiation cases. See note 3, supra.

as nearly as possible the same. A like principle should be aplied to proceedings in this court.

Neither statute nor Tax Court rule makes specific provision for the problem arising if the office of "Commissioner" is abolished.[9] The statutory provision negating any requirement of substitution deals rather with the problem arising "when the incumbent of the office of Commissioner changes." But the policy of preserving the continuity of litigation in the one case points to a like result in the other. Under this view, a petition filed here in the name of the Chairman of the Maritime Commission should be held sufficient to warrant our review, even though the office has been abolished and the former incumbent has become a private citizen. We need not, however, go so far.

The petition here stated in its text that it was brought on behalf of the United States. We think that fact should be given effect. The United States, in its fiscal aspect, was the true opponent of the claims of the contractor before the administrative agency: it did not need to intervene in the proceeding before the Tax Court, for the governing statute had in substance placed it there. Congress had authorized the Tax Court to give relief to an

[9] Compare Reorganization Plan No. 26 of 1950, effective July 31, 1950, 15 Fed. Reg. 4935, 64 Stat. 1280, which transfers all functions of the Commissioner of Internal Revenue to the Secretary of the Treasury. The latter is empowered to authorize the performance of those functions by any other officer, agency, or employee of the Department of the Treasury. The office of Commissioner is not abolished, but its powers are subject to diminution.

aggrieved contractor, and had not deemed it necessary to say specifically that the United States or anyone else should be named as defendant. The Tax Court by its rules created the requirement that a respondent be expressly named—but even so (as we have seen) it required that an officer of the United States be named, in his capacity as an official and not in his individual capacity. For reasons akin, therefore, to those which led us to hold that the proceeding in the Tax Court did not abate, we hold that the petition for review filed in the name of the United States was sufficient to invoke our jurisdiction.[10]

At the same time, we think this proceeding should not continue further without the appearance before us of the official who has succeeded to the powers and functions of the Chairman of the Maritime Commission. Proper exercise of the powers of this court, as well as full protection of the interests of the taxpayer, makes the appearance here of the Secretary of Commerce as a party to this cause desirable if not necessary.[11] The

[10] Our decision in United States v. Seigel, 83 U.S. App. D.C. 88, 168 F.2d 143 (1948), does not dictate otherwise. There, we held that "one who is not a party to a record and judgment is not entitled to appeal therefrom." 83 U.S. App. D.C. at 89, 168 F.2d at 144. But the present proceeding is not an appeal—it is an original judicial proceeding, commenced by petition, to review the decision of an administrative body. The Seigel case therefore seems to us inapplicable here.

[11] *Compare* Land v. Dollar, 88 U.S. App. D.C. 162, 188 F.2d 629 (1951), cert. denied 340 U.S. 948 (1951); Land v. Dollar, 88 U.S. App. D.C. 311, 190 F.2d 366 (1951); Land v. Dollar, 89 U.S. App. D.C. 38, 190 F.2d 623 (1951); s.c. 344 U.S. 806 (1952).

Secretary of Commerce will be given twenty days within which to move to join himself as a party, and to move to correct the caption of the cause. If he fails to do so, we will entertain a motion to dismiss the proceeding.

III

The California Eastern Line has filed a motion to dismiss the Government's petition on the ground that this court lacks jurisdiction by reason of the nature of the question presented, contending it is not one of those which this court will review under the doctrine of *U.S. Electrical Motors* v. *Jones, supra.* We defer decision on that motion, as it deals with the substance of the petition for review. The case will be set down for hearing on the merits after the briefs have been filed.

So ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 APRIL TERM, 1953

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Before CLARK, PRETTYMAN and WASHINGTON, Circuit Judges.

ORDER

The above-entitled case came on to be heard on the motion of petitioner to remand the case to the

Tax Court of the United States with instructions to vacate the decision on review herein and to dismiss the petition for review, and was argued by counsel.

On consideration whereof, it is ORDERED by the Court that, for the reasons indicated in the opinion this day filed herein, the said motion of petitioner be, and it is hereby, denied.

It is further ORDERED by the Court that the Secretary of Commerce of the United States be, and he is hereby, allowed to and including May 6, 1953, within which to move in this Court in the above-entitled case to join himself as a party therein and to move to correct the caption of the case.

It is further ORDERED by the Court that this case be set down for hearing on the merits after the briefs have been filed.

Dated: April 16, 1953. Per Curiam.

United States Court of Appeals for the District of Columbia Circuit. Filed April 16, 1953. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

MOTION TO JOIN AS PETITIONER AND CORRECT CAPTION

United States Court of Appeals for the District of Columbia Circuit. Filed May 5, 1953. Joseph W. Stewart, Clerk.

Comes now Sinclair Weeks, Secretary of Commerce, by his attorney of record, and moves the Court that he be joined as petitioner in the above-entitled proceeding and that the caption of this proceeding be corrected to read "Sinclair Weeks, Secretary of Commerce, Chairman of the United States Maritime Commission; Petitioners v. California Eastern Line, Inc., Respondent."

Reorganization Plan No. 21 of 1950 was effective May 24, 1950 (64 Stat. 1273; 46 U.S.C.A. App. 1111). This plan abolished the United States Maritime Commission including the offices of the members of the Commission and the Chairman thereof and transferred all of the functions of the United States Maritime Commission and of the Chairman of the United States Maritime Commis-

sion pertinent hereto to the Secretary of Commerce. Reorganization Plan No. 21 of 1950, *supra*, was promulgated under the authority of Reorganization Act of 1949 (63 Stat. 206; 5 U.S.C.A. 133z et seq.). It is believed that the proper exercise of the powers of this Court as well as the full protection of the interest of all parties concerned, makes the appearance here, of Sinclair Weeks, Secretary of Commerce as a party to this proceeding desirable and necessary (see opinion of this Court dated April 16, 1953).

Respectfully submitted,

WARREN E. BURGER,
Assistant Attorney General,
EDWARD H. HICKEY,
Attorney,
FREDERICK N. CURLEY,
Attorney,
JAMES H. PRENTICE,
Attorney,
Department of Justice.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 APRIL TERM, 1953

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Before CLARK, PRETTYMAN and WASHINGTON, Circuit Judges, in Chambers.

ORDER

United States Court of Appeals for the District of Columbia Circuit. Filed May 28, 1953. Joseph W. Stewart, Clerk.

Upon consideration of the motion of Sinclair Weeks, Secretary of Commerce, that he be joined as petitioner in the above-entitled case and to correct the caption of this case in conformity with the opinion of this Court entered herein April 16, 1953, and of respondent's objections thereto, it is

ORDERED by the Court that the motion of Sinclair Weeks, Secretary of Commerce, be granted and that the caption of this case be, and it is hereby, changed to read as follows:

> "The United States of America and The Secretary of Commerce, as Successor to the Chairman of the United States Maritime Com-

mission, Petitioners, v. California Eastern Line, Inc., Respondent."

Dated: May 28, 1953.

Per Curiam.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Decided January 21, 1954

United States Court of Appeals for the District of Columbia Circuit. Filed January 21, 1954. Joseph W. Stewart, Clerk.

Mr. Frederick N. Curley, Attorney, Department of Justice, with whom *Mr. Edward H. Hickey*, Attorney, Department of Justice, was on the brief, for petitioners.

Mr. Harold B. Finn, pro hac vice, by special leave of Court, with whom *Mr. Robert E. Kline, Jr.*, was on the brief, for respondent.

Before CLARK, PRETTYMAN and WASHINGTON, Circuit Judges.

PRETTYMAN, *Circuit Judge*: This is a petition to review a decision of the Tax Court of the United States in a renegotiation case. California Eastern Line, Inc., respondent here, was the owner of the American steamship "Vermont". In 1941 it entered into a written contract signed by the British Ministry of War Transport as the other party. Under the contract the vessel was used to transport cargo from New York to Sudan, in the Red Sea range. Respondent company received payment for the service. In 1949 the Chairman of the Maritime Commission entered an order determining that the company had realized excessive profits under the contract and proposing to renegotiate the contract. Thereafter he determined that the company had derived $164,000 of such profits within the meaning of the Renegotiation Act.[1] The company appealed to the Tax Court of the United States, which made extensive and detailed findings of fact and rendered an exhaustive opinion. It found as a fact that "The charter of the Vermont was neither a contract with the Commission or with any other department named in the Renegotiation Act, nor a subcontract under such a contract."[2]

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[1] 56 STAT. 245 (1942), as amended, 50 U.S.C.A. App. § 1191.

[2] 17 T.C. 1325 (1952).

The Renegotiation Act[3] empowers renegotiation of "the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor." The statute defines the word "Department" thus:[4]

> "The term 'Department' means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively."

Upon the basis of its findings of fact, as above indicated, and these provisions of the statute, the Tax Court determined: " * * * we have been unable to conclude that this contract is covered by the statute." It ordered and decided that "there is no renegotiable contract within Section 403(c)(1) of the Renegotiation Act." The present petition for review followed.[5]

The first question is whether this court has jurisdiction to review the decision of the Tax Court in this matter. The statute[6] provides that the Tax

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[3] 56 STAT. 983 (1942), as amended, 50 U.S.C.A. App. § 1191 (c) (1).

[4] 57 STAT. 348 (1943), as amended, 50 U.S.C.A. App. § 1191 (a) (1).

[5] After the filing of the petition Government counsel moved to remand to the Tax Court. This motion was denied. Chairman of U. S. Maritime Comm'n v. California Eastern Line, 92 U.S. App. D.C. —, 204 F. 2d 398 (1953).

[6] 58 STAT. 86 (1944), 50 U.S.C.A. App. § 1191 (e) (1).

Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." This court has held several times that in renegotiation cases it can review decisions of the Tax Court in respect to jurisdictional and Constitutional questions only.[7]

In 1945 this court had before it a renegotiation case which was strikingly similar to this one.[8] The evidence in the present case is more extensive, but the basic facts, *i.e.*, the contract, the signatories, the performance, are identical in all material respects. The Waterman Steamship Corporation was the owner of steamships and chartered some of them by contract signed by the British Ministry of War Transport. The Maritime Commission proposed to renegotiate the profits realized by the company on those contracts. The company maintained that the contracts were with a foreign government and therefore not subject to renegotiation. The company forthwith brought a civil action in the District Court seeking an injunction or a declaratory judgment. The District Court

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[7] *E.g.*, U. S. Electrical Motors v. Jones, 80 U.S. App. D.C. 329, 153 F. 2d 134 (1946); Psaty & Fuhrman v. Stimson, 87 U.S. App. D.C. 47, 182 F. 2d 985 (1950); Lowell Wool By-Products Co. v. War C. P. A. Bd., 89 U.S. App. D.C. 281, 192 F. 2d 405 (1951); Knu-Vise, Inc. v. War Contracts Price Adjustment Bd., 90 U.S. App. D.C. 218, 195 F. 2d 198 (1951).

[8] Waterman S. S. Corporation v. Land, 80 U.S. App. D.C. 167, 151 F. 2d 292 (1945).

dismissed the action, on the ground that the company had not exhausted its administrative remedies. On appeal to this court the company argued as its first point that the charters were not charters with the Commission or with any department of the United States Government and that accordingly there was no statute which authorized their renegotiation. This court held that the question thus presented was jurisdictional and that, if there was no law compelling renegotiation of the contracts, the company was entitled to invoke the Declaratory Judgment Act. The court thereupon went into an extensive examination of the question as to whether the contract was a contract with the Commission or was a contract with a foreign government and concluded by remanding the case to the District Court for consideration of that one question. The Supreme Court granted *certiorari* and in the course of its opinion wrote as follows:

> "Just as in the *Myers* case [303 U.S. 41], the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by

> the Chairman's determination of excessive profits may have them redetermined in a 'de novo' proceeding before the Tax Court. Section 403(c)(1) of the Act provides that the Tax Court 'shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . .' Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act."[9]

The Court went on to say: "Whether it [the District Court] ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination." The Court reversed this court upon the ground that the company had not exhausted its administrative remedies.

It is argued to us that the long passage which

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[9] Macauley v. Waterman S. S. Corp., 327 U.S. 540, 544, 90 L.Ed. 839, 66 S.Ct. 712 (1946).

we have quoted was *dictum*. Whether it was or was not, we think we cannot disregard it. The problem now before us is precisely the problem involved in that discussion. The Court said without qualification that what are and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this court has no jurisdiction to review the decision of the Tax Court upon the question whether the contract in controversy was or was not renegotiable. We do not understand the Supreme Court to have foreclosed review if requirements of due process were allegedly violated, but we do not have that question before us.

We discussed the *Waterman* case briefly in *Lowell Wool By-Products Co.* v. *War C. P. A. Bd.*[10] and, in respect to the rule as we saw it, said:

> "We think that a question whether a certain contract is within those to be renegotiated is a question of coverage, but that a question whether the Board has any power whatever over a particular company, apart from the nature of its contracts, is a question of jurisdiction."

The Government argues that in a later case[11] the Supreme Court, discussing the *Waterman* case,

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[10] 89 U.S. App. D.C. 281, 283, 192 F. 2d 405, 407 (1951).

[11] Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 766, 91 L.Ed. 1796, 67 S. Ct. 1493 (1947).

said: "The Waterman Corporation had contracted directly with a government agency, the Maritime Commission." This sentence, says the Government, was a conclusive finding upon the point in dispute in the *Waterman* case and also in the case at bar. But we think the Supreme Court did not intend that this one sentence, in the midst of a discussion of the *Waterman* case for other purposes, should constitute a final and conclusive finding of fact in a case which was not then before the Court and as to which it had no record, and particularly where the Court had held that the Tax Court must make the initial finding of that precise fact.

It follows from the foregoing that this petition for review must be dismissed for lack of jurisdiction. If it were determined that the question of the renegotiability of this contract went to the jurisdiction of the Tax Court and thus could be reviewed by this court, we would have to review the rulings of the Tax Court upon the subsidiary questions which went to make up its ultimate conclusion that it had jurisdiction. In that event we would review those questions on the same basis as we would review the record of a District Court proceeding.[12] Those questions as to which the petitioners allege error have been argued to us. Petitioners complain of the refusal of the Tax

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[12] *Cf.* Sec. 1141 (a), Int. Rev. Code, 26 U.S.C.A. § 1141 (a); U. S. Electrical Motors v. Jones, 80 U.S. App. D.C. 329, 331, 153 F. 2d 134, 136 (1946).

Court to admit in evidence a document purporting to be an official statement on the part of the British government.[13] They also claim error on the part of the Tax Court in various conclusions surrounding the negotiation and execution of the contract in dispute and concerning transactions which occurred pursuant to the contract. Petitioners further say that the Tax Court erred in the inferences which it drew from the clauses of the contract. We do not reach these contentions, as we lack jurisdiction of the question to which they are subsidiary.

Petition dismissed.

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[13] We note that the Tax Court does seem to have taken a look at the British statement, and Judge Raum, who wrote the opinion, observed that even upon that basis the Government did not establish its point.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 JANUARY TERM, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Before: CLARK, PRETTYMAN, and WASHINGTON, Circuit Judges.

JUDGMENT

United States Court of Appeals for the District of Columbia Circuit. Filed January 21, 1954. Joseph W. Stewart, Clerk.

This case came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for review in this case be, and the same is hereby, dismissed for lack of jurisdiction.

Dated: January 21, 1954.

Per Circuit Judge PRETTYMAN.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 JANUARY TERM, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR TO THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Before: CLARK, PRETTYMAN, and WASHINGTON, Circuit Judges, in Chambers.

ORDER

United States Court of Appeal for the District of Columbia Circuit. Filed February 23, 1954. Joseph W. Stewart, Clerk.

On consideration of the petitioners' motion for an extension of time within which to file petition for rehearing in banc herein, and it appearing that the said petition was lodged with the Clerk, and it further appearing that the respondent has not filed objections to this motion, it is

ORDERED by the Court that the motion be granted and that the Clerk be, and he is hereby, directed to file forthwith the aforesaid petitioners' petition for rehearing in banc.

Per Curiam.

Dated: February 23, 1954.

DOCKET ENTRY OF FILING OF PETITION FOR REHEARING EN BANC

"2-23-54 Per Curiam order directing Clerk to file forthwith petitioners' petition for rehearing in banc.

2-23-54 25 copies petitioners' petition for rehearing in banc.

2-23-54 Certificate of service of petitioners' petition for rehearing."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 JANUARY TERM, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Before: STEPHENS, Chief Judge, and EDGERTON, CLARK, WILBUR K. MILLER, PRETTYMAN, BAZELON, FAHY, WASHINGTON, and DANAHER, Circuit Judges, in Chambers.

ORDER

United States Court of Appeals for the District of Columbia Circuit. Filed March 12, 1954. Joseph W. Stewart, Clerk.

Upon consideration of petitioners' petition for a rehearing in banc, and of respondent's answer thereto, it is

ORDERED by the Court that the aforesaid petition for a rehearing in banc be, and it is hereby, denied.

Per Curiam.

Dated: March 12, 1954.

Chief Judge STEPHENS did not participate in the foregoing order.

SUPREME COURT OF THE UNITED STATES

No. ——— OCTOBER TERM, 1953

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

vs.

CALIFORNIA EASTERN LINE, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 9th, 1954.

(S.) EARL WARREN,
Chief Justice of the United States.

Dated this 29th day of May, 1954.

APPENDIX B

The Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U. S. C. App. 1191, *et seq.*), provides in pertinent part:

Sec. 403 (a). For the purposes of this section—

(1) The term "Department" means the Department of the Army, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

* * * * *

(5) The term "subcontract" means—

* * * * *

(B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, * * *.

* * * * *

Sec. 403 (c) * * *

(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) (B)) do not exceed $500,000 and under subcontracts described in subsection (a) (5) (B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

* * * * *

Sec. 403 (e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before The Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of di-

visions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. * * *

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a re-

determination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

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No. 263

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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No. 263

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v.

CALIFORNIA EASTERN LINE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals deferring action on the jurisdictional question (R. 326) is reported at 204 F. 2d 398; its subsequent opinion holding that it lacked jurisdiction (R. 335) is reported at 211 F. 2d 635. The opinion of the Tax Court (R. 278-302) is reported at 17 T. C. 1325.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1954 (R. 340). The timely motion of the United States and Secretary of Commerce for rehearing *en banc* was denied on March 12, 1954 (R. 341). By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to and including August 9, 1954 (R. 342). The petition for a writ of certiorari was filed on August 6, 1954 and was granted on October 14, 1954 (R. 342). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Renegotiation Act of 1942 (56 Stat. 245, as amended, 50 U.S.C. App. 1191, *et seq.*), and of the judicial review provisions of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed., 1141, 1142) are set forth in the Appendix, *infra,* pp. 71-76.

QUESTION PRESENTED

Whether under the Renegotiation Act of 1942, as amended, the Court of Appeals for the District of Columbia Circuit has authority to review a decision in a renegotiation case by the Tax Court that a contract is not renegotiable because it was not made with a "Department" of the United States.

STATEMENT

The facts pertinent to the issue here raised may be briefly summarized as follows:

During April and May of 1941, the Maritime Commission, at the request of the President and in

an effort to coordinate shipping in the furtherance of the national defense effort, assembled 2,000,000 tons of merchant shipping (R. 234, 279). Because of the shortage of available ships, the Commission, in order to accomplish this task, assembled the required tonnage from intercoastal ships (R. 44). Included among the intercoastal ships so assembled was respondent's vessel, *Vermont* (R. 44, 280).

At that time, the British Government requested from the United States, under the Lend-Lease program, shipping facilities which it needed to transport war equipment and supplies for its North African campaign, then going badly against the allies. Pursuant to this request, the President authorized the Maritime Commission to negotiate with various shipowners, including representatives of respondent, in order to secure the necessary tonnage for this operation.[1] After numerous conferences during April and May 1951, Commission officials and the shipowners worked out the terms under which the *Vermont* and other vessels were to be chartered for the Red Sea operation, including the charter rates which the owners were to be paid.

During the course of the negotiations between the Commission officials and the shipowners, it was understood by all the negotiating parties, including

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[1] This operation ultimately became known as the "Red Sea operation" because of the ultimate destination of the vessels. Cf. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 542. There are 12 additional Red Sea charter cases pending in the Tax Court involving more than $7,000,000 in excessive profits. In all, there were 93 Red Sea voyages by 22 shipowners, of whom 7 voluntarily repaid excessive profits of more than $3,000,000. It was administratively determined that two shipowners had not received excessive profits.

respondent, that the British Government would probably be the formally named charterer under the charters for this Red Sea operation (R. 284) and respondent's charter was actually signed by a representative of the British Ministry of War Transport (R. 24). Neither the British Government nor any of its agencies or representatives, however, took part in the negotiations with the shipowners on the terms of the charter of the *Vermont* or the other ships for the Red Sea program (R. 284) and the charter was not formally executed by the British Ministry of War Transport representative until after performance had begun by the sailing of the *Vermont* for Port Sudan on May 29, 1941 (R. 284-285). The Commission paid all bills and other obligations which arose under this charter directly to the shipowners from funds appropriated by the Congress of the United States (R. 105, 135, 143, 151), and the British Government did no more than certify to the Commission that the charter services had been performed (R. 134, 142, 150).

Full performance under respondent's charter was not completed until after April 28, 1942, the date on which Congress enacted the Renegotiation Act, 56 Stat. 245, 50 U. S. C. App. 1191. In accordance with the terms of this Renegotiation Act, as amended, the Chairman of the United States Maritime Commission, on November 27, 1943, commenced renegotiation proceedings with respondent in an effort to eliminate the excessive profits which respondent had realized from its Red Sea venture (R. 51-53). On March 31, 1949, a unilateral re-

negotiation order was issued determining that respondent had received $164,000 in excessive profits from its charter (R. 15-16).[2]

Respondent petitioned the Tax Court for redetermination of its excessive profits under Section 403(e)(2) of the Renegotiation Act, as amended, *infra*, pp. 74-75 (R. 4-14). Thereafter, it moved the Tax Court to consider first, from among the various issues raised by its petition, the issue whether the Red Sea contract was subject to renegotiation (R. 25-31). This issue turns on whether respondent's charter, although formally executed by the British Ministry of War Transport, was in fact with the Maritime Commission and so a renegotiable contract with a "Department" under Section 403(a) of the Renegotiation Act, as amended, *infra*, p. 71. The Tax Court granted this motion (R. 38),[3] and after a hearing on this issue,[4] the court concluded, one judge dissenting, that the charter was with the British Ministry of War Transport

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[2] The delay in issuing this order was attributable, in some measure, to the institution of judicial proceedings by some of the shipowners, including respondent (R. 27), who sought to enjoin the administrative proceedings on the ground that the charters were not subject to renegotiation. This effort came to nought when this Court held that the failure to exhaust administrative remedies precluded judicial consideration of the issues attempted to be raised. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540.

[3] As a result of this severance, no issue as to the amount of excessive profits was presented to the Tax Court; the questions presented were restricted to a consideration of the jurisdiction of the Maritime Commission and the Tax Court to subject respondent's Red Sea charter to renegotiation.

[4] The Tax Court excluded from evidence (R. 277, 297) an Official Statement of the British Government, which petitioners had received through official government and diplomatic chan-

and not with the Commission, and therefore was not subject to renegotiation under the Act (R. 278-302).

Relying on prior decisions of the District of Columbia Court of Appeals (see *infra*, pp. 24 ff.), the Government filed a petition in that court (under Section 1141 of the Internal Revenue Code of 1939, 26 U.S.C., 1952 ed., 1141, *infra*, pp. 75-76) for review of the Tax Court's decision that respondent's Red Sea charter was not renegotiable (R. 302-305). Respondent moved to dismiss the petition on the ground that the court was without jurisdiction to pass on this issue (R. 318). After hearing argument on this motion, the court deferred decision thereon until the hearing on the merits (R. 333).[5] After further argument, the

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nels, to the effect that when a representative of the British Government executed the charter it was understood "that His Majesty's Government in signing said charters were agents only" and "that the principal and real party in interest was the United States as represented by the United States Maritime Commission" (R. 272). This ruling appears to be contrary to *Ex parte State of New York*, 256 U.S. 503, and other persuasive rulings.

[5] The court simultaneously denied the Government's motion to remand the cause to the Tax Court with instructions to vacate its decision on the ground that since Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 46 U.S.C. 1111, note) had abolished the position of the Chairman of the Maritime Commission, the named respondent in the Tax Court, and had transferred his functions to the Secretary of Commerce, the proceeding had abated with respondent's failure to make timely substitution (R. 311-18, R. 326-32). However, the court went on to rule that, since the Secretary of Commerce had failed to appear in the proceeding before it, there might be an absence of proper parties, and allowed time for him to appear (R. 329-32). In accordance with this ruling, the Government moved to substitute the present petitioners for the Chairman of the Maritime Commission, which motion was granted (R. 333-4).

division of the court sitting on the case (Clark, Prettyman and Washington, J. J.) held that it lacked jurisdiction to pass on the question. Quoting from this Court's opinion in *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, 544 [6] the opinion, written by Judge Prettyman, concluded (R. 338):

> The problem now before us is precisely the problem involved in that discussion. The Court said without qualification that what are

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[6] The *Waterman* language quoted by Judge Prettyman is as follows (see R. 337-8).

> Just as in the *Myers* case [(303 U.S. 41], the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403(e)(1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * *" Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and what are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act.

> and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this court has no jurisdiction to review the decision of the Tax Court upon the question whether the contract in controversy was or was not renegotiable.

Petitioners' petition for rehearing by the Court of Appeals *en banc* was denied (R. 341).

SUMMARY OF ARGUMENT

I

Since 1946 the Court of Appeals for the District of Columbia Circuit has consistently ruled in several cases brought by contractors that it has power to review renegotiation decisions of the Tax Court on constitutional or "jurisdictional" issues, notwithstanding the finality provision in the 1942 Renegotiation Act, as amended.[7] In this case, the first renegotiation appeal by the Government, the Court of Appeals, relying on a misinterpretation of *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, and ignoring its own prior rulings, held that the Tax

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[7] Section 403 (c) of the amended Renegotiation Act, *infra*, pp. 73-75, provides for *de novo* redetermination by the Tax Court of administrative findings of excessive profits, and declares that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

Court's ruling that respondent's Red Sea charter is not renegotiable was not open to judicial review.

A. Far from requiring such a result, this Court in the *Waterman* case expressly reserved decision on the question of the scope of judicial review of Tax Court renegotiation decisions once rendered, and, as made clear in *Lichter* v. *United States,* 334 U.S. 742, and *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, decided only issues relating to primary jurisdiction and exhaustion of the Tax Court remedy.

B. The decision below that the court was without authority to review the issue whether the course of dealing between respondent and the Maritime Commission culminated in a "contract * * * with the Departments" within the meaning of Section 403 (a) and (c) of the Renegotiation Act, is plainly inconsistent with the prior rulings of the Circuit. That court had already held that the issue of contract renegotiability was open to judicial scrutiny. See *e.g., Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board,* 177 F. 2d 727, certiorari denied, 339 U.S. 912, considering "as jurisdictional" the renegotiability of certain contracts with R.F.C. subsidiaries. The court had also reviewed other issues indistinguishable from the present one—whether a course of dealing between a steel salesman and government contractors constituted a "subcontract" under the Act (*Armstrong* v. *War Contracts Price Adjustment Board,* 194 F. 2d 875, certiorari denied, 343 U.S.

967), and whether certain corporations were subject to the Act because under "common control" (*Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405).

Moreover, the present problem is far different from the questions that the Court of Appeal has held non-reviewable—issues pertaining directly to the computation or appraisal of costs and excessiveness of profits, or relating to the procedures to be followed before the Tax Court and the renegotiating agencies. These are questions involved in the "determination" of the "amount" of excessive gain. The issue here is of a wholly distinct calibre; it goes to the primary question of whether the renegotiating agency and the Tax Court may even undertake the computation or appraisal of costs and profits.

II

The Government early and for some time urged that the Renegotiation Act precludes any judicial review of Tax Court renegotiation decisions. But when we re-examine the problem from the standpoint of 1955, in the declining stage of litigation, a change in our position is warranted. The anticipated flood of appeals has not materialized. The long-established pattern of review followed by the District of Columbia Circuit has proved acceptable to both Government and contractors. Those factors, together with certain legislative developments, seem to us to make it inappropriate at this time to change the basic standards of review adopted by

that Circuit. Analysis of the pertinent statutory and legislative materials shows nothing conclusive either way, but there is certainly good ground for sustaining review to the extent that it has been allowed in the District of Columbia.

A. The categorization of *issues* involved in renegotiation cases into reviewable jurisdictional or constitutional questions and non-reviewable "determination" questions finds support in a close examination of the text of the "finality" clause of Section 403(e) of the Act, which covers only the Tax Court's "determination" of the "amount of excessive profits". The internal structure of the Act seems to differentiate between an "order" or "decision"—which includes the whole of the adjudication—and the "determination" of "amount", which has the narrower compass of computation and appraisal of costs and profits. Since it is the Tax Court's special expertise which is being protected from encroachment, it would be appropriate to restrict the "finality" clause to those business and financial matters with which that tribunal is normally concerned.

Other phases of the Tax Court's decisions—not involving findings on costs, profits, or amounts—would be reviewable in ordinary course under former Section 1141(a) of the Internal Revenue Code, which provides in general terms for review by the courts of appeals of Tax Court rulings.

B. The legislative history of the Tax Court section of the Renegotiation Act contains no mention of the problem of judicial review of Tax Court re-

negotiation determinations, but it does show (a) some belief that the constitutional courts would pass on at least some issues under the Act, and (b) that the choice of the Tax Court as the tribunal to review the administrative findings of excessive profits was rested on its special competence and experience in business matters. It is therefore consistent with the legislative history to read the "finality" clause, along with the District of Columbia Circuit, as limited to such matters, and not as covering all aspects of the Tax Court decision. Without disapproving in any way of this view, of which it was aware, Congress enacted a new Renegotiation Act in 1951 with the same Tax Court provisions.

C. The District of Columbia Circuit's formulation of reviewable "jurisdictional" issues and unreviewable "non-jurisdictional" issues—discussed in detail in Point I—is workable and should not be disturbed, if the Court agrees that some measure of review of non-constitutional questions is permitted.

ARGUMENT

Introduction

The Court of Appeals for the District of Columbia Circuit has, over the Government's initial opposition, repeatedly insisted since 1946 that it has power to review Tax Court renegotiation decisions on constitutional and "jurisdictional" grounds.[8] Since the great bulk of the holdings in this field are by the District of Columbia Court of

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[8] *E.g., U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjust-*

Appeals,[9] and the law in that court had become so firmly established by frequent reiteration and application, the Government sought review of the Tax Court's determination that the Red Sea charters were not renegotiable. As we show in detail below (*infra*, pp. 24 ff.), the appellate court's previous rulings on comparable issues justified the Government in believing that the issue was "jurisdictional" and therefore reviewable.

Nevertheless, in this instance—the first in which the Government has invoked the court's asserted jurisdiction—the division hearing the case departed from the court's heretofore consistent position. Mistakenly invoking language used by this Court in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544, the panel held that the renegotiability of the charters is a question of "coverage" within the non-reviewable jurisdiction of the Tax Court. This deviation without express overruling of any prior

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ment Board, 192 F. 2d 405; *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, certiorari denied, 343 U.S. 967; *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U.S. 912; *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U.S. 943; see the Memorandum for Respondent in Opposition, *Martin Wunderlich Co.* v. *Secretary of War*, No. 666, Oct. Term, 1952.

[9] The exceptions are two Ninth Circuit decisions (*French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, and *Warner* v. *War Contracts Price Adjustment Board*, 188 F. 2d 363), in which that Court of Appeals held that Section 403(c)(1) of the Renegotiation Act, as amended, *infra*, pp. 73-74, foreclosed appellate review of Tax Court decisions. However, that court seems to suggest that Tax Court determinations may be collaterally attacked, on grounds similar to those recognized by the District of Columbia Court of Appeals, in the district court suits brought by the Government to recapture the excessive profits.

decision,[10] coupled with some expressions from a number of the other judges of the District of Columbia Court of Appeals indicating disagreement with the limited scope of review recognized in the instant case,[11] impelled the Government to seek the aid of this Court in steadying the future course of renegotiation adjudication in the District of Columbia Circuit.

In Point I, *infra*, pp. 15-36, we demonstrate first that this Court has not passed upon the issue of what renegotiation questions, if any, are reviewable on appeal from the Tax Court, but on the contrary has expressly reserved opinion. We then show that under the prior decisions of the District of Columbia Circuit the Tax Court's ruling on the renegotiability of respondent's contract is open to ap-

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[10] In *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, the only other renegotiation appeal by the Government to that court, the District of Columbia Circuit, after first holding that it had power to review (see 345 U.S. 950), later held that the issue of timely commencement of renegotiation is non-jurisdictional and not reviewable. The court expressly overruled that phase of its decision in *Blanchard Machine Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U.S. 912, in which it had held, on a contractor's appeal, that the issue was jurisdictional and reviewable. See *infra*, p. 34, fn. 27.

[11] These statements were made from the bench during the oral argument, subsequent to the decision here, of three Tax Court renegotiation cases appealed by the contractors. *Estate of Robert I. Gale, et al.* v. *United States of America*, C.A. D.C., No. 11,906 (argued April 14, 1954, before Edgerton, Miller, and Bazelon, JJ.); *Hanlon-Waters, Inc.* v. *United States*, C.A. D.C., No. 11,934 (argued May 12, 1954, before Miller, Bazelon, and Fahy, JJ.); *Jacob Lichter, et al.* v. *United States, et al.*, C.A. D.C., No. 11,925 (argued May 12, 1954, before Miller, Bazelon, and Fahy, JJ.). To date no decision has been forthcoming in any of these cases.

pellate review. Point II, *infra*, pp. 36-69, discusses the question, three times reserved by this Court, of whether there is any review of Tax Court renegotiation decisions on non-constitutional issues. The Court may wish merely to accept, without independent examination, the general formulation of limited scrutiny of the District of Columbia Circuit. But if the Court does go further, we present our position from the standpoint of 1955, looking toward the close of renegotiation litigation. The Government's initial fear of numerous, protracted, and burdensome appeals if review were allowed has not materialized. The general standards followed by the District of Columbia Circuit since the decision early in 1946 in *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134, have proved workable and acceptable to other courts and to the Government, as well as to contractors generally. There is very substantial basis for this rule in the wording, purpose, and history of the Renegotiation Act. We suggest, therefore, that the Court may deem it appropriate, as we do, not to work any major change in the established rule at this relatively late stage of the renegotiation program.

I

The Holding That Contract Renegotiability Is Barred from Appellate Review Is Not Required by This Court's Decisions and Is Contrary to Prior Rulings of the District of Columbia Circuit.

The three-judge division hearing this case rested its judgment mainly on some language in this Court's opinion in *Macauley* v. *Waterman*

S. S. Corp., 327 U.S. 540, also a Red Sea charter case, which it held required it to rule that Tax Court decisions as to the renegotiability of a contract are not subject to appellate examination.[12] But in our view the panel not only read *Waterman* incorrectly, it also ignored, without attempting to overrule, prior decisions of its own court, rulings which for the most part were issued after *Waterman* and reached results contrary to that obtained here.

A. *The ruling below is not required by Macauley v. Waterman S. S. Corp., 327 U. S. 540*

According to the division below, the *Waterman* case holds that the Tax Court has final and unreviewable jurisdiction to decide whether contracts are renegotiable under the Renegotiation Act (R. 338):

> * * * The [Supreme] Court said without qualification that what are and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this Court has no jurisdiction to review the decision

[12] The statute here applicable is the First Renegotiation Act, part of the National Defense Appropriation Act of 1942, as amended by the Second Renegotiation Act, part of the Revenue Act of 1943 (enacted February 25, 1944). The Second Renegotiation Act added, *inter alia*, the provisions for Tax Court review. Other amendments to the 1942 Act, extending its coverage and adding to the powers of the Secretaries, are also relevant. See *Lichter* v. *United States*, 334 U.S. 742, 772-4. The Act as partially reproduced in the Appendix appears with all relevant amendments.

> of the Tax Court upon the question whether the contract in controversy was or was not renegotiable. * * *

This conclusion is based on the Court's statement in *Waterman* (327 U. S. at 544) that:

> * * * Contrary to respondent's contention that this language [13] limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act.

But when these words are read in context and in conjunction with later decisions of the Court, it becomes plain that the Court did not pass upon the issues which are now before it. In this Court there is no controlling authority and these questions are, therefore, entirely open.

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[13] The Court is specifically referring to the clause of Section 403 (c)(1) of the Second Renegotiation Act which provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits" (*infra*, p. 73).

1. The *Waterman* case did not involve an attempted review of a Tax Court renegotiation decision; the administrative proceedings which are necessary preliminaries to instituting suit in the Tax Court had not even been completed. The purpose of the district court action brought by the shipowner in that case was to obtain (1) a declaratory judgment that his Red Sea charters, similar to the present charter, were not renegotiable because made with the British Government and not with an agency named in the Renegotiation Act, and (2) an injunction prohibiting the continuation of the administrative proceedings. As a result, the sole issue before this Court was whether the district court had jurisdiction to grant the relief prior to the initiation and termination of the administrative proceeding. In holding that the district court lacked jurisdiction, the Court declared (327 U. S. at 544-5), immediately following the excerpt quoted by the division below:

> * * * In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the *Myers* case [*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41], the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act.

In so holding the Court reversed the decision of the District of Columbia Circuit (151 F. 2d 292) which had held (as summarized in the opinion below, R. 337) "that the question thus presented [the renegotiability of the contracts] was jurisdictional and that, if there was no law compelling renegotiation of the contracts, the company was entitled to invoke the Declaratory Judgment Act," without completing the administrative renegotiation proceeding. This Court did *not* find error in the holding of the District of Columbia Circuit that the question presented was "jurisdictional", but rather held that the Renegotiation Act had granted to the Tax Court the "exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act. In order to grant the injunction sought the District Court would have to decide this issue in the first instance." (327 U.S. at 544.) "*Whether it ever can do so or not,*" it could not decide that issue "*in the first instance.*"

Against this background, there can be little doubt that this Court's reference, stressed in the opinion below, to questions of coverage being within the exclusive jurisdiction of the Tax Court dealt solely with delineation of the matters committed to the original jurisdiction of the Tax Court to the exclusion of the district courts, and was not intended to treat the scope of review once the Tax Court had made its determination. In other words, as we read the *Waterman* opinion, the Court was there merely explaining that, along with its exclusive and

final jurisdiction to determine the amount of excessive profits, the Tax Court also has exclusive (i.e., primary) jurisdiction to decide questions of its own jurisdiction that are collateral to and necessarily preliminary to that computation—, a result which involves no novel principle of law. *Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

The fundamental error in the opinion below is its reading of "exclusive," as used in *Waterman*, as necessarily synonymous with "unreviewable."[14] It seems quite clear that this Court used "exclusive jurisdiction" in order to point out that the Tax Court, *rather than some other trial forum such as a district court,* has initial competence to pass upon these renegotiation questions. But the Court did not decide what would be the province of the constitutional courts once the Tax Court had rendered its decision. On the contrary, it reserved that problem, even for the district courts, by saying, "Whether it [the district court] ever can do so or not, it cannot *now* decide questions of coverage * * *" (emphasis added).

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[14] The distinction between "exclusive" jurisdiction and "nonreviewable" jurisdiction is emphasized by cases such as *Knowles* v. *Hirsch*, 65 F. Supp. 690 (D. D.C.), holding that even constitutional contentions must first be presented to the Tax Court but that once that tribunal has ruled on those contentions appellate courts can review the rulings. See also *Wade* v. *Stimson*, 65 F. Supp. 277 (D. D.C.), affirmed, 331 U. S. 793.

Accordingly, there is no basis in *Waterman* for the inference by the division below of a necessary dichotomy between unreviewable questions of "coverage" (i.e. renegotiability of a contract or a contractor's business) and reviewable issues of the "jurisdiction" of the Tax Court. As the District of Columbia Circuit has decided in its prior cases (*infra*, pp. 24-30, 32-33), "coverage" can overlap and include "jurisdiction", so that while under *Waterman* the Tax Court must first pass on questions of coverage, this does not necessarily mean that, once the Tax Court has acted, its decision is not subject to appellate reexamination, at least insofar as it involves the Tax Court's jurisdiction over the subject matter of the case.

2. That this Court in *Waterman* intended to pass only on the power of a district court to grant relief prior to the termination of the administrative proceedings, and not on the scope of review of Tax Court decisions, is further demonstrated by the subsequent rulings in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, and *Lichter* v. *United States*, 334 U.S. 742, decisions which the opinion below completely overlooks. *Aircraft & Diesel*, like *Waterman*, involved a district court suit by a contractor seeking a declaratory judgment and injunction but, unlike *Waterman*, the agency renegotiation proceeding had been completed and a petition for redetermination was pending in the Tax Court. Again holding that the district courts were without jurisdiction to enter-

tain such a suit, this Court, in addition to explaining the *Waterman* case as involving solely the principle of exhaustion of administrative remedies (331 U. S. at 755), expressly distinguished between the statutory provision conferring exclusive original jurisdiction upon the Tax Court (*vis a vis* the district courts) in renegotiation matters and the provision concerning the finality of Tax Court decisions (331 U. S. at 768-769).[15] As to scope of the latter, the Court unequivocally stated (331 U. S. at 771):

> We do not express any opinion indeed we explicity reserve decision, upon the question of the finality of Tax Court decisions in these matters. * * *
>
> We are not forced in this case however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose. Nor need we become involved in an attempt to decide what particular questions it might have left, or did leave, for that body's final and conclusive disposition. For it seems obvious, in view of the Act's terms, history, objects and the policies incorporated, that Congress clearly and at the very least intended the Tax Court's functions not only to

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[15] Only the first provision was mentioned in the *Waterman* opinion (see *supra*, fn. 13, p. 17). The second provision (also appearing in Section 403 (e) (1)) is that the "determination" of the Tax Court "shall not be reviewed or redetermined by any court or agency" (*infra*, p. 73).

> be put in motion but to be fully performed, before judicial intervention should take place at the instance of one in appellant's position.

In *Lichter*, where the defendant contractors sought to resist the Government's district court suits to recapture excessive profits as determined by the renegotiating agencies on the ground that such determinations were invalid, this Court, at the same time that it reaffirmed *Waterman* and *Aircraft & Diesel* by sustaining the exclusiveness of the Tax Court remedy, again distinguished the question of the finality of such Tax Court decisions and explicitly noted that it was not passing on that issue (334 U.S. at 791):

> No petitions were filed with the Tax Court in any of the cases before us, and the time for doing so has expired. Accordingly, here, as in *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 771, we do not have before us, and we do not express an opinion upon, the finality which would have attached to a redetermination by the Tax Court if such a redetermination had been sought and made. We have only the situations presented by the respective failures of the petitioners to resort to the Tax Court in the face of the express statutory provisions made for such administrative relief.

It is thus quite plain that, contrary to the division below, this Court in *Waterman* and the later cases has merely affirmed the requirement of ex-

haustion of administrative remedies and has not passed on the "finality" to be accorded the Tax Court decision or the scope of appellate review of Tax Court rulings in renegotiation cases. That issue has three times been expressly reserved by this Court.

B. *The Decision Below Is Inconsistent with the Prior Rulings of the District of Columbia Circuit.*

Though the problem of review has been left open by this Court, it has been resolved for the District of Columbia Circuit by a series of rulings. The heart of the Government's complaint before this Court that the holding below is directly contrary to the prior decisions of the Circuit which have permitted review in cases such as this. The result is an unequal application of the law, precluding appellate scrutiny of the most important decision against the Government rendered by the Tax Court under the Renegotiation Act. If Tax Court renegotiation determinations are to be reviewable, as the court below has consistently held, there should be equality of treatment, for both Government and contractors, under the rules established by that court for the exercise of its appellate function.

1. The vital issue before the Tax Court was whether the Red Sea charter negotiations between respondent and the Maritime Commission (expressly named as a "Department" in Section 403 (a) of the Renegotiation Act, *infra*, p. 71) culmi-

nated in a "contract with the Department" within the meaning of Section 403(c) of the Act. If so, the renegotiability of that contract cannot be disputed. The Tax Court held that there was no contract with the Commission but only with the British Ministry of War Transport (R. 299-300). Relying on the District of Columbia Circuit's repeated holdings in some thirteen decisions since 1946 that it had authority to review constitutional and "jurisdictional" issues, and on that court's decisions defining "jurisdictional", the Government sought review of the Tax Court's ruling (R. 302-5).

The District of Columbia Circuit first held that it had authority to review Tax Court renegotiation decisions on "jurisdictional" questions in *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134 (1946).[16] The court held reviewable a decision of the Tax Court that the petition for review filed pursuant to Section 1142 of the Internal Revenue Code was filed too late to enable the Tax Court to take jurisdiction of the case. Referring to the "finality" provisions of the Act,[17] the court said (153 F. 2d at 136-7):

> We think, therefore, that the statute places exclusive and unreviewable jurisdiction in the

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[16] *U. S. Electrical Motors* was the only pertinent case decided by the District of Columbia Circuit prior to the *Waterman* case. The several later cases were decided after *Waterman*.

[17] Section 403 (c) (1) of the Second Renegotiation Act: "* * * Upon such filing [*i.e.*, of a petition for redetermination

> Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination, but that a ruling upon the jurisdiction of the Tax Court is untouched by that provision and, therefore, remains reviewable by this court.

The Tax Court was reversed and was ordered to hear the case and make the appropriate determination. A number of later decisions (see fn. 8, *supra*, pp. 12-13) repeat and reaffirm the rule, recognized in the opinion below (R. 336), that "in renegotiation cases it [the Court of Appeals] can review decisions of the Tax Court in respect to jurisdictional and Constitutional questions only." [18]

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by the Tax Court], such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

[18] Since there is no constitutional issue involved here, we do not stop to discuss in detail the cases treating with review of constitutional points. It suffices to note that in *Blanchard Mach. Co.* v. *R. F. C. Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U.S. 912, the District of Columbia Circuit ruled that it could decide questions of constitutionality in the application of the Act and did so without serious objection from either side. It held that the retroactive application of the amendment of July 1, 1943, to subcontracts made with the Defense Plant Corporation was not unconstitutional, on authority of *Lichter* v. *United States*, 334 U.S. 742. On this issue, the case was reaffirmed in *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99, and again in *Warner & Swasey Co.* v. *War Contracts Price Adjustment Board*, 201 F. 2d 201. In the *Eastern* case, the court also held that renegotiation was not a taking of property without just compensation and that the reduction of profits was not unconstitutionally confiscatory in the absence of their complete elimi-

A survey of the decisions since 1946 reveals the type of issue which the court below has considered "jurisdictional" and therefore subject to review. *U. S. Electrical Motors, supra,* dealt with the contention that the contractor had delayed too long in invoking its Tax Court remedy. Similarly, jurisdiction over proper persons was held to be an appropriate issue for review in *Warner & Swasey Co.* v. *Board of Directors, R.F.C.,* 170 F. 2d 164, where the court decided that the correct successor in law to the Defense Plant Corporation was the Reconstruction Finance Corporation itself, rather than the directors of the R.F.C. or the members of its Price Adjustment Board, and accordingly ordered the Tax Court on remand to dismiss petitions pending against the directors and the members of the Board.

Of particular significance are several cases in which the District of Columbia Circuit has reviewed issues very closely analogous to, or indistinguishable from, that raised by the present case (all of which, under the terminology adopted by the panel below, might well be regarded as issues of the "coverage" of the Act). In *Maguire Indus-*

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nation and was therefore not a deprivation of property without due process of law. In *Ring Construction Corp.* v. *Secretary of War,* 178 F. 2d 714, certiorari denied, 339 U.S. 943, the court ruled that the retroactive clause of the 1942 Act was not unconstitutional, again following *Lichter* v. *United States, supra.* Finally in *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Board,* 195 F. 2d 198, the court held that in increasing the amount of excessive profits found by the Board, the Tax Court did not violate procedural due process.

tries v. *Secretary of War,* 185 F. 2d 434, the court ruled that the Act applied to determinations of the Tax Court in regard to proceeds received for part of a fiscal year, as well as those received for a whole fiscal year, and ordered the Tax Court to reinstate the petition it had dismissed. *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board,* 192 F. 2d 405, concerned the issue whether two companies were "under common control" for the purpose of applying the $500,000 war-business floor provision of Section 403(c)(6) of the Renegotiation Act, *infra,* p. 72.[19] The Court of Appeals held that the issue was one of "jurisdiction," subject to review (192 F. 2d at 407):

> * * * it is enough to say that in our opinion the determination that petitioner and Nichols & Co., Inc., were under common control was a determination of jurisdiction. It is clear that the finding of common control was requisite to the right of the Board to renegotiate any profits of this petitioner Company.

In the later case of *Armstrong* v. *War Contracts Price Adjustment Board,* 194 F. 2d 875, certiorari denied, 343 U.S. 967, the court held to be "jurisdictional" the question whether a particular salesman

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[19] In general, the Act does not apply to contractors if "the aggregate of the amounts received or accrued in such fiscal year by the the contractor or subcontractor and all persons under the control of, or controlling or under common control with the contactor or subcontractor, under contracts with the Departments and subcontracts * * * do not exceed $500,000 * * *."

receiving commissions on sales by steel companies under contracts or subcontracts with the Government was a "subcontractor", as defined in Section 403(a)(5)(B) of the Act, *infra*, p. 71,[20] and therefore subject to renegotiation.

And in four cases the Court of Appeals has expressly reviewed issues of contract renegotiability, the precise type of question which the division below held not to be open to appellate scrutiny. In *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U.S. 943, there was held reviewable not only the constitutionality of the Renegotiation Act, as applied to contracts entered into prior to its enactment in 1942, but also the issue of whether such contracts were covered by the Act, *i.e.*, their renegotiability under the Act as a matter of statutory interpretation.[21] See 178 F. 2d at 715. Similarly, in *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied,

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[20] The Act defines "subcontract" as including "Any contract or arrangement * * * (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract. * * *"

[21] The review of the constitutional issue did not carry with it review of the Tax Court's construction of the statute, if the latter were not independently reviewable. As is the practice where this Court passes upon the constitutionality of a state statute in a case coming from a state court, the District of Columbia Circuit could have accepted the Tax Court's retroactive construction, if that were not independently reviewable, and considered the constitutionality of the Act on that basis.

339 U.S. 912; *Eastern Machinery Co.* v. *Under Secretary of War,* 182 F. 2d 99; and *Warner & Swasey Co.* v. *War Contracts Price Adjustment Board,* 201 F. 2d 201, certiorari denied, 345 U.S. 924, the District of Columbia Circuit reviewed "as jurisdictional" the renegotiability, under the 1943 amendment to the Act, of certain contracts with Reconstruction Finance Corporation subsidiaries which had been completed prior to the amendment's enactment in July 1943. As here, one of the issues passed upon in each case was the renegotiability of a contract said by the contractor not to be covered by the Act.

2. As this summary shows, the Court of Appeals has held "jurisdictional" the issues of whether the Government agency involved was a "Department" within the meaning of the Act (*Blanchard Mach. Co.; Eastern Machinery Co.; Warner & Swasey Co.,* II), whether the contract is one of a class that the Act subjects to renegotiation (*Ring Construction Corp.*), whether an exemption contained in the Act applies to the contract under consideration (*Lowell Wool*), and whether the renegotiated individual was a "sub-contractor" under the Act (*Armstrong*). In each instance the contractor urged that the whole of his Government business, or some particular contract or class of contracts, was not renegotiable under the Act—was beyond the reach of the renegotiating agency and (by the same token) of the Tax Court. In each case, the Court of Appeals held that it had competence to pass upon this

contention and then proceeded to render a determination on its merits. That is the precise situation now before the Court. Respondent claims that its Red Sea charter cannot be renegotiated because not made with a "Department", and the Tax Court has agreed. The prior decisions of the Court of Appeals plainly open wide the door for the Government's plea to review the Tax Court's ruling against renegotiability. See Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 433, 443-444 (July 1954).

It is true that the *Lowell Wool* opinion (*supra*, p. 28), appears, by way of dictum, to regard the issue of "common control" (in applying the $500,000 minimum requirement for renegotiability) as on a different plane for purposes of review than the "question whether a certain contract is within those to be renegotiated" (192 F. 2d at 407).[22] But *Armstrong* later held that the appellate court could determine whether certain of a salesman's commission agreements could be renegotiated as "subcontracts", and in *Ring, Blanchard, Eastern Machinery*, and *Warner & Swasey Co., II*, the

[22] It may be noted in passing that the *Waterman* case (*supra*, pp. 16-21) is discussed only in *Lowell Wool* and the instant case, although subsequent to *Waterman* the court below issued some 12 decisions on this general question. And while *Lowell Wool* seems to read *Waterman* as holding contract renegotiability to be an issue within the nonreviewable jurisdiction of the Tax Court, it also expressly recognizes that *Waterman* "rested upon failure to exhaust administrative remedies, and the Court, by one or two expressions, reserved decision upon the question of subsequent judicial review" (192 F. 2d at 407).

Court of Appeals deliberately decided for itself that certain contracts were "within those to be renegotiated." [23]

The truth is that there is no valid distinction between an issue such as "common control" and that of contract renegotiability. Both concern questions which must be answered before the renegotiating agency or the Tax Court can proceed to renegotiate the profits of a particular contractor or those derived from a particular contract. Both questions therefore involve "jurisdiction". *Lowell Wool* seems to suggest (192 F. 2d at 407) that the difference lies between a decision on power to recapture *any* profits at all from the contractor (*i. e.*, authority to renegotiate any of his contracts), and a ruling on the coverage of particular contracts once it has been decided that some of his business is within the Act. But this tentative demarcation of the boundary fails to take account of the other District of Columbia cases just mentioned (*supra*, pp. 24-30) in which the court did review the renegotiability of selected contracts, and certainly the suggestion has no force here where the Government relies on only one contract to establish its right to recapture excessive profits from respondent. Moreover, it does not make much sense to hinge reviewability on the fortuitous presence or absence of one concededly renegotiable agreement, which may be far outweighed in importance and amount by the disputed contract or contracts. The

[23] The opinion below does not refer to any of these five prior decisions.

proper criterion is simply whether the renegotiating agency or the Tax Court has power to consider the controverted contract or class of contracts in determining the contractor's excessive profits. That issue is one of jurisdiction over the subject matter which the Court of Appeals, under its own rulings, must and can consider.[24]

3. Buttressing the conclusion that the renegotiability of the Red Sea charters is jurisdictional, under the law developed and applied by the District of Columbia Circuit, is the line of cases in which that court has held a problem to be non-jurisdictional and therefore beyond its power to consider. In *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99, and *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Bd.*, 195 F. 2d 198, the court ruled that it would not consider any of the petitioners' allegations of error as to the Tax Court's computation of the amount of excessive profits.[25] The same ruling was made in *Ring Con-*

[24] The court's prior decisions make it clear that reviewability *vel non* does not turn on whether the appellate court has merely to decide issues of statutory interpretation in the abstract, or whether it has to consider particular findings and individual circumstances. In both *Lowell Wool* and *Armstrong*, the court considered and passed upon detailed and specific factual situations in deciding the questions of "common control" and "subcontract". Even in *Ring* and the *Blanchard* series, the rulings on the retroactivity of the Act and its amendments were not divorced from the particular circumstances before the court.

[25] In the *Eastern Machinery Co.* case, the question involved was the correctness of the Tax Court's refusal to allow as costs certain salaries paid out to corporate officers.

In *Knu-Vise*, the court refused to review a determination by the Tax Court that certain royalty payments were not deductible as costs.

struction Corp. v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U. S. 943.[26] The court also held in *Ring* that it would not review the Tax Court's decision as to burden of proof in its proceedings. In *Psaty & Fuhrman* v. *Stimson*, 182 F. 2d 985, and in *Keller* v. *United States*, 207 F. 2d 610, certiorari denied, 347 U. S. 918, the court ruled unreviewable the question of whether the Tax Court correctly decided that petitioners' accounts should be renegotiated on a completed-contract basis rather than on a fiscal year basis. Finally, in *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, the court overruled its prior decision in *Blanchard Mach. Co.* v. *R. F. C. Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U. S. 912, and held that it would not review a decision by the Tax Court that the Secretary of War had failed to follow proper procedure in not expressly mentioning a particular contract when commencing renegotiation proceedings against the company and hence had not complied with the statutory time limit requirement for the commencement of such proceedings.[27] See fn. 10, *supra*, p. 14.

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[26] In *Ring*, the questions that the court refused to review concerned (a) the risks assumed by the contractor and the rate of profit it should fairly earn, (b) the costs the contractor could claim on account of certain payments to sub-contractors, and (c) the proper allowance for the contractor's state income tax.

[27] Although *Wunderlich* bears a superficial resemblance to *U. S. Electrical Motors*, *supra*, pp. 25-26, 27, because both cases involve time limit questions, the difference is actually substantial. The issue in *U. S. Electrical Motors* was whether the petition for review in the Tax Court had been filed on time;

In these decisions the Court of Appeals has marked out the category of questions of "law" which it early held in the *U. S. Electrical Motors* case (*supra*, pp. 25-27) were included in the unreviewable determinations by the Tax Court of the amount of excessive profits. Typical issues of law decided by the Tax Court which would appear not to be reviewable are rulings on the interpretation of the contract with respect to the allowability of certain costs, a conclusion on the legal relationship of certain parties to the contracts in order to determine whether payments to the former are properly allowable as salaries, or a ruling as to how much income tax must be paid under state law. Such problems, integral to the determination of proper costs and proper profits, are undoubtedly "legal" but they are not "jurisdictional."

The issue here is sharply different from those the court below has indicated are to be treated as

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timely filing of a petition for review in the Tax Court under former Int. Rev. Code § 1142 is a jurisdictional prerequisite to Tax Court review. *Forest Glen Creamery Co.* v. *Commissioner of Internal Revenue*, 123 F. 2d 522 (C.A. 7); cf. *United States ex rel. Carey* v. *Keeper of Montgomery County Prison*, 202 F. 2d 267 (C.A. 3); *Slater* v. *Peyser*, 200 F. 2d 360 (C.A. D.C.). On the other hand, the decision of the Tax Court in *Wunderlich* related to the procedures before the Price Adjustment Board since there was no dispute as to when over-all renegotiation actually began. The issue was whether, in commencing renegotiation, the Board must notify the contractor expressly of each contract intended to be renegotiated, on pain of forfeiting its right to determine excessive profits. This question is a procedural one calling for an application of the Tax Court's expert judgment as to standards of fairness in Board relationships with contractors, and hence more clearly in the non-reviewable category.

non-jurisdictional. It is not one closely related to the computation of costs or profits; it does not require the use of judgment as to which costs are allowable or how much profits are excessive; it does not involve any difficult or technical questions of accounting theories or methods in which the Tax Court's expertise is essential; nor does it relate to mere matters of procedure either in the Tax Court or in the renegotiating agency. Rather, it is an issue going directly to the authority of both the administrative agency and the Tax Court to consider respondent's Red Sea charter and to render a decision that respondent did or did not receive excessive profits from that operation. That class of issue has, as we have shown (*supra*, pp. 24-31), been scrutinized in the past by the court below.

The Government is entitled to equality of treatment under the rules prevailing in the District of Columbia Circuit. It has the right to ask this Court to require the panel below to apply to this case the standards held to be controlling in the past and which will apparently continue to govern appeals heard by other divisions of the court. See *supra*, fn. 11, p. 14; cf. 13-14, 24-36.

II

There Is Good Ground for Sustaining Appellate Review by the District of Columbia Circuit of Constitutional and Jurisdictional Issues Arising from Tax Court Renegotiation Decisions.

Introductory: Thus far in this brief, we have urged that under the principles applied by the Dis-

trict of Columbia Circuit, which recognizes partial review of Tax Court renegotiation decisions, the Tax Court's holding in this case was plainly subject to appellate examination. Respondent may counter-attack by arguing that under the "finality" provisions of the Renegotiation Act there can be no review at all in the Court of Appeals, at least of non-constitutional issues. This Court, as we have already indicated (*supra*, pp. 16-24), has not as yet passed upon that contention. Admittedly, there is room for the argument we expect respondent to make. But it may be that the Court will prefer, at this autumn period of renegotiation litigation, to pretermit that question and to accept without independent examination the general principle, adopted by the court below, that despite the "finality" clause some control may be exercised on direct appeal from the Tax Court. On that view, the Court would content itself with delimiting and supervising the proper application by the Court of Appeals of its principles of review.

The Court may wish, however, to meet more directly the general issue of reviewability which it has thrice reserved. In that event, it is the Government's obligation to make its present position clear. At the beginning of renegotiation litigation and for some years, the Government urged on the courts of appeals, with diminishing force, the view that the "finality" clause of the Renegotiation Act (*infra*, p. 73) precluded any direct appellate review of Tax Court decisions, especially of non-constitu-

tional issues.[28] In the renegotiation cases heard by this Court (the last one was in November 1947), our position was, primarily, that the issue did not have to be reached, but, if it was, that there was probably no review in the courts of appeals, at least on non-constitutional issues.[29]

More recently, the Government has incidentally suggested, while opposing certiorari on the merits

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[28] See *Waterman SS Corp.* v. *Land*, 151 F. 2d 292 (C.A. D.C.), reversed *sub nom. Macauley* v. *Waterman SS Corp.*, 327 U.S. 540; *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134 (C.A. D.C.); *Blanchard Mach. Co.* v. *RFC Price Adjustment Board*, 177 F. 2d 727 (C.A. D.C.), certiorari denied, 339 U.S. 912; *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714 (C.A. D.C.), certiorari denied, 339 U.S. 943; *Warner* v. *War Contracts Price Adjustment Board*, 188 F. 2d 363 (C.A. 9); *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560 (C.A. 9). After *U. S. Electrical Motors*, the issue was raised *pro forma* in the District of Columbia Circuit only in order to preserve it.

In the *Warner* and *French* cases, the Ninth Circuit held that Section 403(c) of the Renegotiation Act precluded direct appellate review of Tax Court renegotiation decisions. However, the court seems to believe that Tax Court decisions may be collaterally attacked in the district court suits brought by the Government to recapture the excessive profits. See fn. 9, *supra*, p. 13.

[29] See Brief for the Appellee, *Mine Safety Appliances Company* v. *Forrestal*, Oct. Term, 1945, No. 71, pp. 15, 27 ff; Brief for the Petitioners, *Land* v. *Waterman SS Corp.*, Oct. Term, 1945, No. 435, pp. 43 ff; Brief for the United States, *Lichter* v. *United States*, Oct. Term, 1947, Nos. 105, 74 and 95, p. 127. In *Aircraft & Diesel Equipment Co.* v. *Hirsch*, Oct. Term, 1946, No. 95, the Government's brief (p. 21) said only that, if the contractor were entitled to review of the Tax Court decision, the courts would be in a position to provide it, citing the *U. S. Electrical Motors* decision (*supra*, pp. 25-27, *infra*, pp. 43-44).

of some of the renegotiation cases sought to be brought here, that there may be no appellate review at all; the most recent such statement, in April 1953, was that "Although there are grounds which support" the position of the District of Columbia Circuit, "the arguments which may be advanced to the contrary are probably more persuasive."[30] For several years, however, the Government has not had occasion squarely to face the problem in this Court. This case presents the first opportunity.

We have reexamined the issue from the standpoint of 1955. It is now over eight years since the court below first declared in 1946, in *U. S. Electrical Motors* (*supra*, pp. 23-27, *infra*, pp. 43-44), the principles of review which have become established in that circuit. The Government's opposition, at that time, to the allowance of any review in the courts of appeals was largely based on the anticipated volume of appeals from thousands of Tax Court renegotiation orders, appeals which it was feared would result in clogging the courts and frustrating the Congressional purpose of speedy, expert, and efficient renegotiation.

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[30] See Brief for Respondent in Opposition, *Blanchard Machine Co.* v. *RFC Price Adjustment Board*, No. 540, Oct. Term, 1949, at p. 9, n. 5; Brief for Respondent in Opposition, *Ring Construction Corp.* v. *Secretary of War*, No. 656, Oct. Term, 1949, at pp. 1, 3-4; Memorandum for Respondent in Opposition, *Martin Wunderlich Co.* v. *Secretary of War*, No. 666, Oct. Term, 1952, pp. 3-4. In *Keller* v. *United States*, Oct. Term, 1953, No. 538, the Government's Brief in Opposition, p. 16, fn. 7, merely reserved the right to make the argument, if certiorari were granted.

That fear has not materialized. There have been less than thirty appeals from the Tax Court,[31] and though more are in prospect the burden has not been heavy, either on the Court of Appeals or on the parties. The present Renegotiation Act has been extended for one year, but the peak of litigation in this field is undoubtedly past and it seems unlikely that future appeals can be many or burdensome. The limitation of review established in the District of Columbia Circuit[32]—described in Point I, *supra*, pp. 24-36, has, of course, tended strongly to diminish the number of appeals, and it will no doubt continue to do so. But at the same time this pattern has

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[31] As noted above (*supra*, pp. 12-13), all but three appeals have been brought in the District of Columbia Circuit. The exceptions are the *French* and *Warner* cases, brought in the Ninth Circuit (see *supra*, p. 13, fn. 9), and *Ebco Mfg. Co.* v. *Secretary of Commerce* (C.A. 6, No. 12288). The latter appeal, which has not yet been argued or decided, and involves the same question of timely commencement of negotiation as *Wunderlich*, *supra*, pp. 14, 34, was brought in the Sixth Circuit in an attempt to avoid, if possible, the *Wunderlich* result. Ebco's original intention, as evidenced in its correspondence with the Department of Justice, was to seek review in the District of Columbia Court of Appeals.

In the *French* case, the Ninth Circuit held that if Tax Court renegotiation decisions were reviewable in a court of appeals the venue could be in the District of Columbia Circuit. The Government is making the same argument in *Ebco*.

[32] This pattern has recently been specifically approved by the Court of Appeals for the Sixth Circuit, in a case which did not come to it on direct review of a Tax Court decision. *Marie and Alex Manoogian Fund* v. *United States*, 212 F. 2d 369, 370. See also the *French* case, *supra* (182 F. 2d 560, 565); *United States* v. *Wissahickon Tool Works*, 200 F. 2d 936, 939 (C.A. 2). The *Ebco* case, fn. 31, *supra*, is a case of attempted direct review to the Sixth Circuit.

proven acceptable, as a practical matter, to both the Government and the general body of contractors concerned with renegotiation. Legislative developments since the Second Renegotiation Act (which was enacted in February 1944 and provided the Tax Court remedy) tend to indicate that Congress has also accepted such limited judicial review (see *infra*, pp. 66-68).

For these reasons, we hesitate to discuss the problem or to found our position solely on the materials and considerations which would have been dominant if this were still 1944 or 1946. The impact of the intervening history cannot be denied, and it would be rigidly doctrinaire to insist on ignoring it. In the light of the needs of the present and the future, we suggest that the Court may deem it inappropriate to set aside the general standards for review adopted by the District of Columbia Circuit, since objective analysis of the pertinent materials shows a reasonable basis for either position with nothing conclusive favoring either side. If anything, our present view is that the materials tend to support the result reached by the District of Columbia Circuit.

A. *The Statute*

Section 403(e)(1), incorporated by reference in subsection (e)(2), *infra*, pp. 73-75, provides that upon the filing of a petition for redetermination of excessive profits, the Tax Court

> shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such

> excessive profits * * * and such determination shall not be reviewed or redetermined by any court or agency.

It can, of course, be said that the language "and such determination shall not be reviewed or redetermined by any court or agency" affirmatively prohibits *all* review of Tax Court decisions. The words certainly permit that construction. But no court has ever read the language so broadly as to preclude all review. Even the Court of Appeals for the Ninth Circuit, which held in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, that this language prohibited direct appellate review, ruled that constitutional issues as well as certain other issues may be raised in the district courts (182 F. 2d at 565). See also *Brown & Williamson Tobacco Corp.* v. *United States*, 201 F. 2d 819 (C.A. 6); *United States* v. *Wissahickon Tool Works*, 200 F. 2d 936 (C.A. 2); *United States* v. *Bonnell*, 180 F. 2d 145 (C.A. 9); *Howell Electric Motors Co.* v. *United States*, 172 F. 2d 953 (C.A. 6); *Spaulding* v. *Douglas Aircraft*, 154 F. 2d 419 (C.A. 9). These decisions all necessarily contemplate only a limited finality, for raising such issues in the district courts would surely be contrary to the statutory prohibition against "review or redetermination by any court or agency" if that provision were read as broadly as possible. Compare Section 10(b), Administrative Procedure Act, 5 U. S. C. 1009(b). Indeed, since all (including the Government) have agreed that at least constitutional issues may be raised after a Tax Court redetermination (cf. *Lichter* v. *United States*, 334 U. S.

742, 789-793; see *infra*, pp. 62-63), it is clear that the "finality" clause cannot be interpreted as forbidding *all* review. The prohibition is neither self-revealing nor all-inclusive, and major clues to its scope must therefore be sought further in its wording and purpose, against the background of the general jurisprudence of review.

1. *The specific wording of the "finality" clause.*

(a). The key words in the clause are "determine", "determination", and "amount" of excessive profits. It is only a "determination" as to "the amount of excessive profits" which is unreviewable, and the Tax Court is only given "exclusive jurisdiction" to finally "determine" the "amount" of excessive profits. This formulation, in itself, gives substantial support to the District of Columbia Circuit's conclusion in *U. S. Electrical Motors v. Jones*, 153 F. 2d 134, that the intent was not to bar review of all aspects of Tax Court decisions, but only its "determination" of the "amount" of excessive profits (153 F. 2d at 136):

> It [the Act] very carefully says that the Tax Court shall have exclusive jurisdiction to determine the amount of excessive profits. It leaves untouched, by direct reference or otherwise, the remaining content of Section 1141(a) of the Internal Revenue Code.[33] We think, there-

[33] Section 1141(a) of the former Internal Revenue Code was the general provision giving the courts of appeals exclusive jurisdiction to review the decisions of the Tax Court. See *infra*, pp. 53-56, 75-76.

Similar provisions appear in Section 7482 of the new Internal Revenue Code, adopted in 1954.

> fore, that the statute places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination, but that a ruling upon the jurisdiction of the Tax Court is untouched by that provision and, therefore, remains reviewable in this court.

The phrase "determination of excessive profits", as well as its separate components, fit well with this conception of limited finality. The normal reading of the words would seem to be much narrower than that accorded to "decision" or "order", which, in addition to the "determination" of "excessive" profits, would seem to embrace rulings on other issues which might be raised and which, together with the excessive profit determination, go to make up a "decision" or "order".

This distinction between "determination", on the one hand, and "order" or "decision", on the other, appears to be drawn in the statute itself. Section 403(*e*)(1) declares:

> In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time prescribed in subsection (e)(1), such *order* shall be *final and conclusive* and shall not be subject to review or redetermination by any court or other agency. [Emphasis added.]

In addition to using somewhat stronger language ("final and conclusive") to indicate the non-re-

viewable status of orders of the Price Adjustment Board in the absence of exhaustion of remedies, Congress referred to the Board's "order", not its "determination", as being "final and conclusive". And Section 403(e), the Tax Court section, itself begins, "Any contractor or subcontractor aggrieved by an *order* of the Board *determining the amount of excessive profits* received or accrued by such contractor or subcontractor may * * * file a petition with The Tax Court of the United States for a redetermination thereof." [Emphasis added] Congress thus provided that it was to the "order" of the Board that was to be reviewed *de novo* by the Tax Court, not the "determination of the amount of excessive profits". This language suggests that the Tax Court is to undertake a complete examination of the Board proceedings by reviewing the entire Board order, including decisions on questions of jurisdiction which may underlie the order.

On the other hand, only the "determination" of the Tax Court, not its "order", was to be free from judicial review. One can properly infer that review is available for the other components of the "order", including decisions on "jurisdictional issues". The scheme of the Act would then be that all aspects of the renegotiating agency's decision would be reviewable by the Tax Court, while the Tax Court's decision could be reviewed by the courts of appeals only on issues not involved in the actual "determination of the amount of excessive profits".

(b). Moreover, "determination" is used several times in the statute, in its legislative history, and

in regulations issued under the Act as a word of art referring to the process of computation and to the use of expert judgment by which the amount of excessive profits in a contract or series of contracts is computed. Section 403(d) of the original 1942 Act specifies what costs shall not be allowed in "renegotiating a contract price or *determining* excessive profits" [emphasis added]. That section also makes other references to the powers of the Secretaries of the renegotiating departments with respect to accounting measures and computation of costs and reserves. Section 403(e)(3), added by the Revenue Act of 1942, 56 Stat. 982, refers to deductions and exclusions that must be allowed in "determining the excessiveness of profits realized." Subsections 403(a)(4)(B), (C), and (D), added by the Revenue Act of 1943, 58 Stat. 78, repeatedly use of the word "determination" with reference to computation of costs and use of accounting methods. Sections 403(c), (d) and (e) in the same amendment are of a similar nature. By contrast, those subsections dealing with questions of coverage or applicability of the Act do not use the word "determination"; *e.g.*, see subsection (h) defining certain profits and "termination date" and subsection (i) dealing with exemptions from the Act.

In testimony before a subcommittee of the Senate Committee on Finance, Under Secretary of War Robert P. Patterson frequently used "determine" in the narrow, accounting sense as did the Senators questioning him. *Hearings Before Committee on Finance on Section 403 of Public Law No. 528, 77th*

Cong., 2d Sess. 16-19. In discussing "determination" on the floor of the House, Representative Disney, chairman of the subcommittee of the Ways and Means Committee studying renegotiation, explained that the Act contained standards to aid in computing the amount of excess profits, using "determine" to mean "compute". 89 Cong. Rec. 9927; see also 89 Cong. Rec. 9944-5. The House, Senate, and Conference Reports on the Revenue Act of 1943 (containing the Second Renegotiation Act) also seem to use the term narrowly as synonymous with the process of computation. H. Rep. No. 871, 78th Cong., 1st Sess., 36, 37, 80-2; S. Rep. No. 627, 78th Cong., 1st Sess. 32, 104-6; H. Rep. No. 1079, 78th Cong., 2d Sess. 76-81.

The Regulations of the War Contracts Price Adjustment Board, promulgated under authority of the Revenue Act of 1943,[34] contained detailed explanations of how costs and profits were to be "determined". Parts 1604, 1605, 32 Code Fed. Regs. c. XIV (Supp. 1944). These explanations deal with what elements of costs were to be considered in defining excessiveness of profits, methods of payment, effect of taxes, and other like subjects. Earlier regulations such as those of the War Department Price Adjustment Board also defined "determination" of profits in terms of accounting principles.

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[34] The Second Renegotiation Act established the War Contracts Price Adjustment Board as an over-all renegotiation agency for the future (see *Lichter* v. *United States*, 334 U.S. 742, 789). Previously, renegotiation was carried on by the individual agencies and departments, generally through their own Price Adjustment Boards (see *Lichter*, *supra*, p. 775).

War Department Price Adjustment Board, *Principles, Policy and Procedure to be Followed in Renegotiation*, pp. 14-17 (1942), see *Hearings Before Committee on Finance on §403 of Public Law No. 528*, 77th Cong., 2d Sess., p. 21. And in a *Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission*, submitted to the Committee on Ways and Means and to the Committee on Finance, and setting forth policies, principles, and interpretations of the original Act, "determination" was also explained in terms of computation methods and the use of judgment in establishing excess profits. See *Hearings Before the Committee on Ways and Means on H. R. 2324, H. R. 2698, and H. R. 3015*, 78th Cong., 1st Sess., p. 139; *Hearings Before Committee on Finance on §403 of Public Law No. 528*, 77th Cong., 2d Sess., p. 39.

In short, the relevant materials—statutory, legislative, and administrative—treat "determine" and "determination" as related specifically to costs, profits, amounts, computation, and business judgment.

(c). The term "amount" of excessive profits has a comparably restricted connotation. It, too, suggests a finding on costs and calculations, rather than a decision on the entire controversy. The Act does not give finality to the Tax Court's determination of the contractor's "liability" for recapture of excessive profits—a phrase which would more clearly endow the total decision with conclusiveness. Finality on "amount" seems to exclude the stages of decision prior to the actual study of business, financial, and related materials in the effort to reach

a figure representing excessive profits. Decision on whether or not to undertake that study at all in the particular case—the issue of "coverage"—would not be included.

We do not deny, of course, that it would be entirely reasonable to read the words "amount of excessive profits" more broadly. Our emphasis is that it is also entirely reasonable, and perhaps now more fully justified, to read them less widely as designed solely to protect the special expertise of the Tax Court, as the tribunal computing and appraising costs and profits, from encroachment by other officers and agencies, including the constitutional courts.

2. *Propriety of review by a constitutional court.*

Several general principles vie for place in appraising the meaning to be given the "finality" clause. On the one hand, there is the group of principles reflecting concern with unreviewed administrative rulings and stressing the right to review by a "constitutional" court. There is another body of doctrines, on the other hand, limiting review or appeal, whether the decisions be those of administrative agencies or of courts, to the instances specifically prescribed by the legislature.

Even if the Tax Court be viewed strictly as an administrative agency,[35] there is some support for

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[35] The statute establishing it calls the Tax Court "an independent agency in the Executive Branch of the Government". Former 26 U.S.C. 1100; present 26 U.S.C. 7441; cf. *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.S. 716, 725; R. 328 (opinion of court below at earlier stage of this litigation).

a broad construction of the "finality" clause in the cases refusing to accord judicial review in an instance where the statute did not expressly so provide. See *e.g.*, *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297 (right of union to services of Board); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (right to do business with Government); *Butte, A. & P. Ry.* v. *United States*, 290 U.S. 127 (right to receive subsidy); *United States* v. *Williams*, 278 U. S. 255 (widow's pension claim);[36] *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551 (whether special tax assessment should be made); *Eberlein* v. *United States*, 257 U. S. 82 (right to federal job); *Auffmordt* v. *Hedden*, 137 U. S. 310 (fixing of import duties); *Hadden* v. *Merritt*, 115 U. S. 25 (fixing value of foreign coins); *Dorsheimer* v. *United States*, 7 Wall. 166 (whether remission of tax penalty should be made); *Decatur* v. *Paulding*, 14 Pet. 497 (right to widow's pension).[37] Moreover, the

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[36] But note the language that the decision is unreviewable "unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary and capricious." Compare *Reynolds* v. *United States*, 292 U.S. 443.

[37] These cases in which the Court has declined to imply review of administrative action seem to fall generally into two categories: (a) where the interests of the appellant, though enough to give him standing, were not sufficiently substantial to warrant the Court's interference with the administrative process in the absence of clear statutory authority (*Switchmen's Union*, *Perkins*, *Butte, A. & P. Ry.*, *Eberlein* and *Decatur*), and (b) where the administrative decision was one involving technical matters or broad statutory discretion unsuitable for judicial review (*Williams*, *Williamsport Rope*, *Auffmordt*, *Hadden*, and *Dorsheimer*).

Tax Court is a tribunal with "essentially judicial procedures and experience" (*Dobson* v. *Commissioner*, 320 U. S. 489, 498; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 769), and some reliance can be placed on the rule that no appeal need be provided from the decision of a trial court.[38]

But as countervailing weights there are the many instances in which this Court has held action by an administrative agency to be subject to some measure of judicial scrutiny even in the absence of express statutory authorization.[39] For instance, in *Estep* v. *United States*, 327 U. S. 114, a draft case, where the statute not only failed to provide for review but expressly made the administrative decision "final",[40] the Court nevertheless ruled that the Selective Service System's decision may be reviewed to ascertain whether the agency acted within its authority. See also the cases cited in *Estep*, 327

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[38] In our view, there would be no constitutional barrier to interpreting the "finality" clause as precluding all review, at least on non-constitutional questions. See the cases cited in the text, also *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 76-82 (Brandeis J.); *Crane* v. *Hahlo*, 258 U.S. 142; *Hilton* v. *Merritt*, 110 U.S. 97; *Passavant* v. *United States*, 148 U.S. 214; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502.

[39] *E.g.*, *Order of Railway Conductors* v. *Swan*, 329 U.S. 520; *Board of Governors* v. *Agnew*, 329 U.S. 441; *Estep* v. *United States*, 327 U.S. 114; *Stark* v. *Wickard*, 321 U.S. 288; *Shields* v. *Utah Idaho C. R.*, 305 U.S. 177; *Reynolds* v. *United States*, 292 U.S. 443; *Lipke* v. *Lederer*, 259 U.S. 557; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U.S. 163; *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94.

[40] In *Heikkila* v. *Barber*, 345 U.S. 229, 233, the Court indicated the ambiguity inherent in "final".

U. S. at 123, fn. 14; *Heikkila* v. *Barber*, 345 U. S. 229; *Dickinson* v. *United States*, 346 U. S. 389.[41] And in *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369, the Court apparently regarded as settled the rule that "[a]n agency may not finally decide the limits of its statutory power. That is a judicial function."

However, we need not attempt to balance the various decisions and groups of decisions because, as the Court recently declared in applying Section 10 of the Administrative Procedure Act (*Heikkila* v. *Barber*, 345 U. S. 229, 233):

> Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it.

As we have shown (*supra*, pp. 43-49), close examination of the words of the Renegotiation Act and of the "finality" clause reveals good textual support for the general policy followed by the District of Columbia Circuit. In a later section of this brief, we discuss the bearing of the somewhat equivocal legislative history. *Infra*, pp. 56-68. We cannot now say that the purpose of renegotiation will be thwarted or its efficient administration

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[41] Of course, the *Estep* and similar cases involved personal liberty.

impeded by limited appeals. Certainly, the interests on both sides are important enough to merit, even if they do not require, the preventive and curative hygiene of appellate review.[42]

3. *Mechanism for court review.*

There are, as we have pointed out, good grounds in the Renegotiation Act for holding that Congress did not bar a substantial measure of judicial review. How is this to be obtained? In the absence of a specific review provision in the Act, the District of Columbia Circuit reads Section 1141(a) of the former Internal Revenue Code (Appendix, *infra*, p. 75), providing for appellate review of Tax Court decisions, as carrying over (to the extent left open by the "finality" clause) to Tax Court decisions in renegotiation cases. See *supra*, pp. 43-44. Although it is in the Internal Revenue Code, Section 1141(a) provides generally for review of Tax Court decisions, and is not in terms limited to rulings in tax cases; the Internal Revenue Code establishes, and contains all of the various provisions relating to, the Tax Court.

Section 403(e)(1) of the Renegotiation Act, *infra*, pp. 73-74, enumerates certain sections of the Internal Revenue Code which are made applicable in renegotiation proceedings, thereby suggesting at least a limited carry over between the two areas of

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[42] Over $11 billion of taxpayers' money has been recovered under the 1942 Act. *Final Report of War Contracts Price Adjustment Board*, Table II (1951). Other interests may also be affected. For example, a decision that there can be no judicial review might discourage contractors from doing business with the Government.

Tax Court business. This argument, however, was regarded by the Ninth Circuit in the *French* case (182 F. 2d at 561-562, *supra*, pp. 13, 38, 40) as undermined by the non-inclusion of Section 1141(a) in the list, a consideration which the Ninth Circuit regarded as significant. But since the sections enumerated are all concerned with administrative or procedural matters within the Tax Court, it may very well have been considered inappropriate to include a provision relating to appellate review.

A further argument advanced against the limited carryover of Section 1141(a) is that such a carryover also requires, of necessity, application of the venue provisions of former Section 1141(b) of the Internal Revenue Code, *infra*, pp. 75-76.[43] This adjustment, it is urged, is awkward and inappropriate, since in renegotiation there is no action by a "collector," no "return of the tax in respect of which the liability arises," no "Commissioner", and no "taxpayer." As stated in *French* (182 F. 2d at 562), "'* * * the venue provisions were never made to fit a review or appeal as to renegotiation actions because there never was a 'substantive right of appeal' conferred upon the courts of appeals to 'nullify.'"

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[43] Section 1141(b) provides in pertinent part:

(1) * * * Except as provided in paragaph 2, such decisions may be reviewed by the court of appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

The answer to this argument may lie in the following considerations. First, Section 1141(b)(1) goes on to provide that "if no return was made, then [the decision may be reviewed] by the United States Court of Appeals for the District of Columbia". Since there is no "return" in renegotiation, this provision can easily be held applicable. It is not uncommon or unusual in litigation against the Government or an official that the action may be maintained only in a court located in the District of Columbia, and there is nothing particularly awkward or inconvenient in limiting review of Tax Court renegotiation decisions to the District of Columbia Circuit. Second, the Renegotiation Act of 1948 (which has since expired) expressly provided for broad judicial review of Tax Court decisions on all matters of fact and law in renegotiation cases. Section 3(e), 62 Stat. 259, 50 U. S. C. App. 1193(e).[44] Yet that Act made no change in the venue provisions of Section 1141(b), but expressly incorporated it. At least in 1948, Congress did not believe that the venue provisions of Section 1141(b) were useless for renegotiation cases. Third, as we show *infra*, pp. 56-57, 62-63, it was assumed by

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[44] The review provided in subsection (e) of the 1948 Act is much broader than is possible under the 1942 Act, as construed by the District of Columbia Circuit. Under the later provision not only were the decisions of the Tax Court on questions of jurisdiction and constitutionality reviewable but decisions on questions of law concerning the determination of the amount of excess profits itself were reviewable as were findings of fact if not supported by substantial evidence on the whole record. See *infra*, p. 60.

members of Congress and other government officials at the time the Renegotiation Act was considered, enacted, and amended, that there would be judicial review of the Act on constitutional questions. Despite that recognition, no venue provisions other than Section 1141(b) were added to the Act.

There is another reason for holding Section 1141(a) applicable. If the choice is between direct review, as held by the District of Columbia Circuit, and indirect review in district courts, as suggested by the Ninth Circuit, we believe that the procedure adopted by the District of Columbia Circuit would be much more desirable. Not only would direct review make for more orderly judicial administration, but it would result in its most expeditious and efficient disposition of the litigation, in accordance with the Congressional policy in renegotiation matters. See *Lichter* v. *United States,* 334 U. S. 742, 791-2; S. Rep. No. 10, Pt. 5, 78th Cong., 1st Sess. 1-3; H. Rep. No. 871, 78th Cong, 1st Sess. 34-6. Centralizing review in the Court of Appeals at the seat of Government is preferable to dispersal of litigation throughout the various judicial districts, with further opportunity for appeal to ten different courts of appeals.

B. *Legislative History*

1. Like its language, the legislative history of the Renegotiation Act provides no clear-cut answer as to the extent Tax Court decisions in renegotiation cases are to be open to judicial scrutiny. In exam-

ining this legislative history it is important first to note that, although there was no provision in the Act for any review of the determinations of the renegotiating departments until the enactment, on February 25, 1944, of the second Renegotiation Act (in the Revenue Act of 1943) which provided the Tax Court remedy, it was often assumed during the prior period that judicial review could be obtained of decisions of the various Secretaries in the same manner that judicial review could have been obtained of any other administrative decision. See *Hearings Before House Committee on Naval Affairs Pursuant to H. Res. 30,* 78th Cong., 1st Sess., pp. 433, 517. At least one such case was in fact brought before enactment of the Revenue Act of 1943, *Lincoln Electric Co.* v. *Knox,* 56 F. Supp. 308 (D. D. C.), but while it was pending the new Act became law and the suit was dismissed for failure to exhaust the Tax Court remedy. 77 F. Supp. 444 (D. D. C.), affirmed *sub nom Lincoln Electric Co.* v. *Forrestal,* 334 U. S. 841, on the authority of *Lichter* v. *United States,* 334 U. S. 742.

In the legislative history of the 1943 Act (the Second Renegotiation Act), there is a complete absence of any express reference, pro or con, to the issue here presented. The Tax Court provision first appeared in the Revenue Bill as it was reported by the House Ways and Means Committee. The Committee's report (H. Rep. No. 871, 78th Cong., 1st Sess., pp. 76 and 77) noted the absence in the then existing law of provisions for reviewing

decisions of the renegotiating departments, commented on the provision for Tax Court redetermination, noted, in the language of the "finality" clause as finally enacted, that the jurisdiction of the Tax Court was exclusive and its determination of amounts final, pointed out the advantages of *de novo* redeterminations, and explained the details of the procedure. No reference, however, was made to the question of whether the *de novo* decisions of the Tax Court were to be subject to judicial review. Nor was the problem mentioned on the floor of the House, where the Tax Court provisions were debated in detail (89 Cong. Rec. 9928-9, 9935-6).

The Senate Finance Committee held extensive hearings on the House bill and particular attention was given to the provision for Tax Court reconsideration of administrative determinations of excessive profits. Various government representatives argued that to place this work with the Tax Court would overburden that tribunal and that the Court of Claims should be substituted as the redetermination forum; this proposal for substituting the Court of Claims for the Tax Court was discussed at length, again without any mention of review of Tax Court decisions under the House version. *Hearings Before the Senate Committee on Finance on H. R. 3687*, 78th Cong., 1st Sess., pp. 49, 386, 613, 990, 999, 1000, 1015, 1016, 1017, 1026, 1028, 1032, 1070. Agreeably to these suggestions, the bill reported by the Senate Committee substituted the Court of Claims for the Tax Court as the forum for

de novo redeterminations of excessive profits. S. Rep. No. 627, 78th Cong., 1st Sess., pp. 34, 109-110.

On the floor of the Senate the entire question of Court of Claims versus Tax Court proceedings was fully debated, still without any express statement whether there was to be judicial review of Tax Court decisions. (90 Cong. Rec. 505-6, 531-5). During these debates, an amendment was proposed to substitute for *de novo* redetermination by the Court of Claims the more usual "substantial evidence" type of judicial review, and further expressly to provide for certiorari from the Court of Claims to this Court. 90 Cong. Rec. 531. This amendment was rejected (90 Cong. Rec. 535), but the discussion (90 Cong. Rec. 531-535) reveals that the reason for the rejection was that under the substantial evidence type of review the War Contracts Price Adjustment Board would have to keep a formal record of its proceedings; no objection was expressed to the specific provision for Supreme Court review of the Court of Claims' redetermination. The Senate passed the bill as recommended by the Finance Committee.

In conference, however (H. Rep. No. 1079, 78th Cong., 2d Sess.), the Court of Claims provision was eliminated and the Tax Court provision reinstated without any mention of whether the Tax Court's decision was to be open to appellate scrutiny, as the Court of Claims' redeterminations would have been. Further congressional debate in the Senate (90 Cong. Rec. 1300-1), and in the House

(90 Cong. Rec. 1338-9, 1351, 1355), again failed to refer to the problem.

2. This absence of any mention of judicial review of Tax Court decisions permits, of course, the inference that Congress intended no review. Such an inference gathers some support from the further circumstance that in 1945, when hearings were held on a proposed one-year postponement of the termination date of the Renegotiation Act, Mr. E. C. Alvord, testifying on behalf of the United States Chamber of Commerce, suggested that the Act be amended to provide explicitly for judicial review of Tax Court determinations. *Hearings Before the Committee on Ways and Means on H. R. 2628,* 79th Cong., 1st Sess., pp. 174-176. A similar suggestion was made by the National Association of Manufacturers. Hearings, *supra,* at p. 222. But when the extension was enacted, 59 Stat. 294, no such amendment was included. Again in 1951, when the Renegotiation Act of 1951 was being considered,[45] the National Association of Manufacturers and the United States Chamber of Commerce both suggested that an express judicial review provision be included in the 1951 Act similar to the one included in the 1948 Act.[46] *Hearings Before the Committee on Ways and Means on H. R. 2946,* 81st Cong., 2d Sess. p. 226; *Hearings Before*

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[45] The Act now in effect is an extension of the 1951 Act.

[46] See *supra,* fn. 44, p. 55 for discussion of the 1948 review provision which made Tax Court renegotiation decisions under that Act fully as reviewable as Tax Court tax rulings.

Committee on Finance on H. R. 1724, 82d Cong., 1st Sess. p. 71. And on the floor of the House the belief was expressed that the bill should expressly provide for full appeals from the Tax Court (97 Cong. Rec. 586, 594), but once more the Act became law without such a provision.

Although Congress' refusal to accept the suggested amendments for full judicial review could be interpreted as showing Congressional desire that there be no judicial review of any kind under the Renegotiation Act, there are several other interpretations which are equally reasonable. Here, as in every case in which Congress fails to enact a suggested provision in a statute without explanation in debates, reports, or hearings, it is impossible to conclude with any degree of certainty why the omission occurred. It might have been based on a belief that the full appeal provision was undesirable, or on a belief that the matter of appeal is adequately taken care of by the limited review provided by the existing legislation, as interpreted in the District of Columbia. Congress may have refused to add the suggested provision to the 1951 Act because it believed that full judicial review of Tax Court determinations, such as was provided in the 1948 Act, might unnecessarily clog court dockets with extremely complicated cases necessitating judicial examination of huge records, and might result in substitution of judicial judgment for that of the expert Tax Court. Indeed, by reenacting the language of Section 403(e)(1) and its "finality" clause in the 1951 Act, Congress may

have specifically intended to provide a limited appellate review, which, as Congress knew (see *infra*, pp. 66-67), the District of Columbia Circuit had accorded under the same language as it appeared in the earlier Act.[47]

3. While these are materials in the legislative history which might be read as revealing a Congressional purpose against judicial review of Tax Court renegotiation decisions, the same history also contains evidence indicating that Congress understood that there would be at least a limited judicial review. For example, on several occasions various members of Congress plainly assumed that there would be judicial review of Tax Court decisions on constitutional questions, notwithstanding the language of the "finality" clause of Section 403(e). Discussions on the floor of Congress contain a number of references to the review of the statute by this Court, together with a concern whether the Court would hold certain provisions to be unconstitutional. 89 Cong. Rec. 9929-9930 (discussion by Representative Disney, Chairman of the Subcommittee which investigated renego-

[47] That this may be the explanation is suggested by a colloquy in a committee hearing among Representatives Curtis and Camp, Mr. Frank L. Roberts, then Chairman of the Military Renegotiation Policy and Review Board (now a member of the Renegotiation Board), and Mr. Barron K. Grier, Counsel for the Military Renegotiation Policy and Review Board, explaining that a right of appeal from decisions of the Tax Court exists under the general review section, Section 1141, of the Internal Revenue Code. *Hearings Before Committee on Ways and Means on H.R. 2946*, 81st Cong., 2d Sess. p. 18. This undoubtedly has reference to the holdings of the District of Columbia Circuit.

tiation), 9934-5, 9944. And this Court and several courts of appeals have undertaken to decide constitutional questions raised under the Renegotiation Act without regard to the prohibitions of Section 403(e).[48]

There is also some evidence of Congressional recognition that Tax Court renegotiation decisions would be subject to appellate review on nonconstitutional questions, notwithstanding Section 403(e). Representative Vinson, Chairman of the Committee on Naval Affairs and one of the leading proponents of renegotiation, explained on the House floor that subsection (e), which establishes the Tax Court remedy, was being added to the Act not to limit any preexisting right of judicial review but rather to make it perfectly clear that Congress intended that there should be a right of appeal from the renegotiating agency's order. He explained that the only difference among members of the Committee was as to whether the initial review should be *de novo* or on the record. 89 Cong. Rec. 9936. Later, when the Renegotiation Act of 1951 was being considered, a representative of the United States Chamber of Commerce stated to

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[48] *Lichter* v. *United States*, 334 U.S. 742; *Lincoln Electric Co.* v. *Forrestal*, 334 U.S. 841; *United States* v. *Bonnell*, 180 F. 2d 145 (C.A. 9); *Howell Electric Motors Co.* v. *United States*, 172 F. 2d 953 (C.A. 6); *Spaulding* v. *Douglas Aircraft*, 154 F. 2d 419 (C.A. 9); *Blanchard Machinery Co.* v. *R.F.C. Price Adjustment Board*, 177 F. 2d 727 (C.A. D.C.), certiorari denied, 339 U.S. 912; *Ring Construction Co.* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U.S. 943; see *Marie and Alex Manoogian Fund* v. *United States*, 212 F. 2d 369, 370 (C.A. 6).

those members of the Senate Committee on Finance who had been members of the Conference Committee on the Revenue Act of 1943 that they thought they had provided for an appeal from the Tax Court under that Act, but that explicit appeal provisions had erroneously been left out. *Hearings before Committee on Finance on H. R. 1724,* 82nd Cong., 1st Sess., p. 71. No committee member challenged this statement.

Some further indication in the legislative history of the Revenue Act of 1943 that Section 403(e) was primarily intended to prohibit review of the *computation* of excessive profits appears in the Congressional discussion of the reasons for designating the Tax Court as the forum for redetermining excessive profits. In explaining those reasons, Congressman Disney, one of the floor leaders in the enactment of the bill, stated that the Tax Court was chosen because it had dealt with similar problems of defining excessiveness of profits under the excess profits tax and because the standards for the determination of excessive profits were too general and too flexible to be applied by an appellate court. 89 Cong. Rec. 9929. Similarly, during the debates on the amendment proposed in the Senate to substitute "substantial evidence" review for the *de novo* provision (see *supra*, pp. 58-59), the opposition made plain that determination of excessive profits involved the use of broad discretion and expert judgment and therefore was of a type not suitable for judicial examination. 90 Cong. Rec. 532, 533. Comparable discussion emphasizing the discretionary nature of determinations of excessive

profits, the dangers of the abuse of that discretion, and the consequent need for review by an expert body, such as the Tax Court, appears at 90 Cong. Rec. 1353-4, 89 Cong. Rec. 9927-8, 9934, 9944-5, and see 88 Cong. Rec. 3584. In addition, several times during committee hearings it was emphasized by witnesses and by committee members that exclusive *de novo* review power should be placed in an expert body to protect contractors from arbitrary decisions by the Price Adjustment Board, constitutional courts being said to be hampered by an inability to set aside determinations made pursuant to a statutory grant of broad discretion. For example, see *Hearings Before Senate Committee on Appropriations on H. R. 6868,* 77th Cong. 2d Sess., pp. 35-40, 85-7.[49]

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[49] In discussing renegotiation during the debate on the 1951 Act, Representative Vinson stated (97 Cong. Rec. 588):

> Renegotiation is not an exact science. There is no fixed formula or yardstick for the determination of excessive profits, nor is there any fixed maximum to the amount of profits which may be realized or retained by any contractor. The present bill is patterned closely after the wartime renegotiation statute, which also formed the basis for the act of 1948. In it, as in those prior acts, renegotiation remains entirely a judgment operation. It has been successful as such. The bill lays down certain factors, virtually the same as those formerly prescribed, which must be taken into consideration by the renegotiation authorities in determining in every case whether excessive profits exist, and if so, in what amount. Beyond this there are no curbs imposed in the bill upon the officials to whom are granted the authority to make final determinations of excessive profits, subject only to review in the Tax Court of the United States.
>
> This freedom of discretionary action is the outstanding characteristic of the whole technique of renegotiation as it has been developed to this time. It provides at once its greatest virtue and its clearest warning. * * *

The concern thus manifested by Congress for protecting the contractor from arbitrary use of the discretionary power granted by the statute to the Secretaries and to the War Contracts Price Adjustment Board, coupled with the conviction that constitutional courts could not appropriately review such discretionary determinations, strongly suggests that Section 403(e)'s "finality" provision was directed not at barring judicial scrutiny of Tax Court decisions of "jurisdictional" or "coverage" questions arising under the statute, but rather at precluding judicial reexamination of the Tax Court's exercise of discretion or expert judgment in determining the amount of excessive profits.

4. Although the history of subsequent legislation is often of little value in interpreting an act (cf. *Fogarty* v. *United States,* 340 U. S. 8, 13-14), it is helpful in this case to examine the history of the Renegotiation Act of 1951, 65 Stat. 7, 50 U. S. C. 1211-33, because the clauses limiting review in the 1942 Act (as amended) and the 1951 Act are identical. Section 108 of the 1951 Act (50 U. S. C. App. 1218) continued in *haec verba* the language of Section 403(e), notwithstanding the District of Columbia Circuit's exercise of appellate jurisdiction to review questions of jurisdiction and constitutionality. As appears from the hearings, the Committee was aware of the interpretation followed by the District of Columbia Circuit. *Hearings Before Committee on Ways and Means on H. R. 2946,* 81st Cong., 2d Sess., p. 18; see fn. 47, *supra,* p. 62. Nowhere in the legislative history of the 1951 Act was

there expressed any disapproval of the Circuit's exercise of jurisdiction nor was it suggested that the 1951 Act be "tightened up" to foreclose this type of review under Section 108 of that Act. A search of the Congressional Record also reveals that no bill to override the District of Columbia Circuit's approach was ever introduced from 1942 until 1951.

The 1951 Act also contains internal evidence of Congressional recognition that the courts could and would review certain limited questions under that Act. Section 106(a)(6) (50 U. S. C. App. 1216(a)(6)), providing for exemption of certain contracts, prohibits review of any regulations issued, or determinations made, under that section "notwithstanding section 108," the section which continues verbatim the language of Section 403(e)(1) of the earlier Act (including the "finality" provision). Also, Section 106(a)(8), added by Public Law 764, 83d Cong., 2d Sess., contains a similar proviso with respect to certain Board findings.[50] The inclusion of such provisions suggests a Congressional recognition of the necessity of providing that a "finding" or "regulation" or determination of a particular kind not be reviewed in

[50] It will be noted that both of these provisos are consistent with the theory that Congress intended to foreclose review over matters of broad discretion and judgment or matters of accounting only. Subsection (a)(6) precludes review of a discretionary determination that contracts are or are not directly connected with national defense. Subsection (a)(8) forbids review of findings by the Board that competitive conditions affecting sale of certain articles will or will not reasonably prevent excessive profits.

order to foreclose judicial review, even though there exists the general provision forbidding review of the Tax Court's "determination" of the "amount" of excessive profits.

C. *Scope of review*

If there is good ground, as we suggest, for sustaining a limited review of Tax Court renegotiations decisions, is the formulation previously adopted by the District of Columbia Circuit (which we consider in Point I, *supra*, pp. 24-36) an adequate one? Marking the limits of review by reference to "jurisdictional" issues has been attacked as supplying too indefinite boundary lines (Davis, *Unreviewable Administrative Action*, 15 F. R. D. 433, 444 (July 1954)), but it is only the rubric "jurisdictional" which is too ambiguous, not the substance of what is done in its name.

As our discussion in Point I shows, there are two general categories of issues in renegotiation cases. One group includes the questions directly involved in the appraisal of costs, profits and business operations. Because such issues are integral to the "determination" of the "amount" of "excessive profits" they cannot be reviewed by the Court of Appeals, whether they be of law or of fact. In the other general class are the so-called "jurisdictional" issues—the questions which must be answered before the Tax Court can begin to consider the contractor's costs, profits, or operations, in an

effort to determine whether his profits were excessive. In one such case, the issue may be whether the contractor is subject to renegotiation because of his business, taken together with others under "common control", exceeds the statutory minimum of $500,000. *Supra*, p. 28. In another instance, the "jurisdictional" question may be whether the contractor is a "subcontractor", as defined in the Act, and therefore subject to renegotiation. *Supra*, pp. 28-29. Here, the issue is the renegotiability of respondent's Red Sea charter. Before the Tax Court could determine the amount of respondent's excessive profits on that contract, it first had to decide whether the contract was under the Act.

This division of issues is workable. It follows the text of the "finality" clause. *Supra*, pp. 43-49. Above all, it accords with the primary purpose of the "finality" clause, as revealed by its legislative history (*supra*, pp. 62-66), to protect the judgment of the Tax Court, expert in appraising cost and financial data, in those fields in which it has acquired special competence as a tax tribunal. Though presented with the opportunity, Congress has not upset the District of Columbia Circuit's formulation. For all these reasons, we believe that there is no occasion at this time to seek to create a new demarcation of reviewable issues.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals

should be reversed and the case remanded to that court for a ruling as to the correctness of the Tax Court's decision that respondent's contract is not renegotiable.

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APPENDIX

1. The Renegotiation Act of 1942, 56 Stat. 245, as amended, 50 U.S.C. App. 1191, *et seq.*, provides in pertinent part:

> Sec. 403 (a). For the purpose of this section—
>
> (1) The term "Department" means the Department of the Army, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.
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> * * * * *
>
> (5) The term "subcontract" means—
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> * * * * *
>
> (B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, * * *

* * * * *

Sec. 403 (c) * * *

(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted unded subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) (B)) do not exceed $500,000 and under subcontracts described in subsection (a)(5)(B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

* * * * *

Sec. 403 (e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before The Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of di-

visions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. * * *

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermina-

tion thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

2. The pertinent provisions of former Section 1141 of Title 26, U. S. C., 1952 ed., the Internal Revenue Code, are as follows:

(a) *Jurisdiction.*

The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.

(b) *Venue—(1) In general.*

Except as provided in paragraph 2, such decisions may be reviewed by the court of appeals for the circuit in which is located the collector's office to which was made the return of the tax

in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

(2) By agreement.

Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any court of appeals, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

(3) Application of subsection.

This subsection shall be applicable to all decisions of the Tax Court rendered on and after May 10, 1934, and section 1002 of the Revenue Act of 1926, 44 Stat. 110, as in force prior to May 10, 1934, shall be applicable to such decisions rendered prior thereto, except that paragraph 2 of this subsection may be applied to any such decision rendered prior to May 10, 1934.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION,

Petitioners,

v.

CALIFORNIA EASTERN LINE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT.

This is a case arising under Section 403(c)(2) of the Renegotiation Act of 1942, as amended,[1] wherein the Solicitor General, on behalf of the United States and the Secretary of Commerce, is asking this court to issue a writ of certiorari to review a judgment of the United States Court

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[1] Throughout this brief, unless otherwise specified, the terms "Renegotiation Act" and "the Act" refer to the Renegotiation Act of 1942, as amended, *Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress), approved July 1, 1943; and by Public 149, 78th Congress, approved July 14, 1943.*

of Appeals for the District of Columbia Circuit which ordered and adjudged that their petition to that court for a review of a Tax Court decision on a question of coverage "be dismissed for lack of jurisdiction." *United States, et al.*, v. *California Eastern Line, Inc.*, 211 F. 2d 635; petition for a rehearing *en banc* denied by the court, *en banc*, March 12, 1954 (Petition, App. 21a-30a, 32a-33a).

For the reasons stated herein, respondent respectfully suggests to the court that the decision below was correct and that the petition for a writ of certiorari should be denied.

1. Perhaps the most cogent reason why a writ of certiorari should not be issued in this case is because the question presented is so unsubstantial as not to require further argument. The question, as stated by petitioner, is:

> Whether under the Renegotiation Act of 1942, as amended, the Court of Appeals for the District of Columbia Circuit has authority to review a determination by the Tax Court in a renegotiation case that a contract is not renegotiable because it was not made with the United States.

Considering the circumstances under which this case arose, the provisions of the Renegotiation Act, and the proceedings which have already been taken in connection with this and another related case, it seems obvious that, even if reviewed, the question presented would be answered in the negative; or, in other words, that the decision of the court below dismissing the Government's petition for a review is patently correct.

Briefly, the circumstances under which this case arose are as follows:

On March 29, 1941, California Eastern Line, Inc., as owner of the American steamship *Vermont*, entered into

a written contract signed by the British Ministry of War Transport, an agency of the British Government, as the other party. Under the contract, designated therein as a "charter", the vessel was employed to transport a cargo owned by the British Government from New York to Sudan, on the Red Sea. Respondent received payment for the service from lend-lease funds allocated to the Maritime Commission, upon presenting a certification from the British Ministry of War Transport that the services had been rendered in accordance with the contract. In 1943, more than two years after the *Vermont* had delivered her cargo to the British Government at Port Sudan, the Price Adjustment Board of the Maritime Commission commenced a renegotiation proceeding for the purpose of determining whether Respondent had derived any excessive profits under the charter. Although Respondent promptly notified the Board that its charter was not subject to renegotiation, because it was a contract with a foreign government and not with any "department" named in the Act, Respondent's objection to the proceeding was overruled. Six years later, in 1949, the Chairman of the Maritime Commission, purporting to act under authority of Section 403(c) of the Renegotiation Act of 1942, entered an unilateral order determining that respondent had realized excessive profits under the contract, which the Chairman determined to be "a contract with the Departments, as defined in the Renegotiation Act" (R. 15).

Respondent, following the mandatory and exclusive administrative procedure authorized by Section 403(e)(2) of the Act, as construed by this court in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544 (1946), then filed a petition with the Tax Court of the United States asking for a "redetermination" of the amount of alleged excessive profits as unilaterally determined by the Chairman of the

Maritime Commission (R. 4-24). After issue was joined, by the filing of an answer on behalf of the Chairman, Respondent (as petitioner in the Tax Court proceeding) moved the Tax Court to "sever, and decide in the first instance, apart from any other issue raised by the pleadings, the basic issue of whether the specific contract referred to in [the Chairman's unilateral order] was a contract covered by the Renegotiation Act and subject to renegotiation by the Chairman of the Maritime Commission under authority of said Act" (R. 25-31). This motion was granted and, after a hearing on that severed [redacted] issue, the Tax Court made extensive and detailed findings of fact—most of them based upon stipulated facts and documents—and rendered an exhaustive opinion, 17 T. C. 1325 (1952). It found, *as the ultimate fact,* that: "The charter of the *Vermont* was neither a contract with the Commission or with any other department named in the Renegotiation Act, nor a subcontract under such a contract" (R. 278, 288), and then, upon the basis of its findings of fact, said in its opinion:

> "The contract in its terms supports petitioner's position on the first of these [coverage] issues, in that it purports to be a contract only between petitioner and an agency of the British Government. Respondent's reply is that in this matter the British Government acted as the agent of the United States Maritime Commission (to which we refer as the 'Commission'); that petitioner's contract was therefore with the Commission; and, since the Commission was one of the "Departments" named in the Act, that the contract was renegotiable. *The weight of the evidence, however, requires us to reject respondent's premise that the British Government acted as the Commission's agent, and to conclude that the contract was not with the Commission.*

> Accordingly, since it follows that the contract was not subject to renegotiation under the Act, it becomes unnecessary to consider the two remaining objections raised by petitioner." (Italics supplied.)

The Tax Court, by a final order, then ordered and decided: "That there is no renegotiable contract within Section 403 (c)(1) of the Renegotiation Act" (R. 302).

The Government then filed with the United States Court of Appeals for the District of Columbia Circuit a petition for a review of the Tax Court's redetermination of the basic "coverage" issue (R. 302-305).

The Court of Appeals, in the course of an opinion by Judge Prettyman, 211 F. 2d 675, noted initially that:

> "The first question is whether this court has jurisdiction to review the decision of the Tax Court in this matter. The statute provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." This court has held several times that in renegotiation cases it can review decisions of the Tax Court in respect to jurisdictional and constitutional questions only."

Turning then to a consideration of whether any of the questions in the Government's petition for a review raised such a "jurisdictional" question—for it was obvious that no "constitutional" question was involved—the court noted that in 1945 it had before it a renegotiation case which was strikingly similar to this one, *Waterman S. S. Corp.* v. *Land*, 80 App. D. C. 167, 151 F. 2d 292 (1945), reversed by this court on a point of administrative procedure, *sub nom.*, *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540

(1946). The court also pointed out that the basic facts in the earlier case, *i.e.*, the contract, the signatories, and the performance, were "identical in all material respects" to the present case, and then quoted the following excerpt from the decision of this court in that case:

> "Just as in the *Myers* case [303 U. S. 41], the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403(e)(1) of the Act provides that the Tax Court 'shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . .' Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act."

Continuing, the Court of Appeals said:

> "It is argued to us that the long passage which we have quoted was *dictum*. Whether it was or was not, we think we cannot disregard it. The problem now before us is precisely the problem involved in that discussion. The court said without qualification that what are and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this court has no jurisdiction to review the decision of the Tax Court upon the question whether the contract in controversy was or was not renegotiable. We do not understand the Supreme Court to have foreclosed review if requirements of due process were allegedly violated, but we do not have that question before us."
>
> * * * * * *
>
> It follows from the foregoing that this petition for review must be dismissed for lack of jurisdiction.

Nevertheless, purporting to find a conflict between the court's decision in this case and prior decisions of the *same* court in other cases, and proceeding under the provisions of Section 46(c) of the Judicial Code as construed by this court in the *Western Pacific Railroad* case, 345 U. S. 247 (1953), the Government filed a timely petition for a rehearing by the Court of Appeals, *en banc*, stating that it relied upon the following points as basis for a rehearing:

> 1. The decision of this Court in dismissing the petition for review has clearly misapplied the decision of the Supreme Court in *Macauley* v. *Waterman S.S. Corp.*, 327 U. S. 540 (1946).
>
> 2. The Court's decision in this proceeding is inconsistent with and contrary to all prior deci-

sions of this Court thereby resulting in confusion as to the extent to which this Court will review rulings of the Tax Court in renegotiation matters.

3. The issues raised in this proceeding were clearly restricted to a determination of whether or not the Tax Court had jurisdiction over respondent.

These points, it will be noted, are in substance the same as the first three reasons advanced by the Government in support of its petition for the issuance of a writ of certiorari by this court.

After taking the matter under advisement, all of the active circuit judges of the circuit, except Chief Judge Stephens who did not participate in the matter, entered the following order denying the Government's petition for a rehearing *en banc* (Petition, App. 32a-33a):

Before: STEPHENS, Chief Judge, and EDGERTON, CLARK, WILBUR K. MILLER, PRETTYMAN, BAZELON, FAHY, WASHINGTON, and DANAHER, Circuit Judges, in Chambers.

ORDER

United States Court of Appeals for the District of Columbia Circuit. Filed March 12, 1954. Joseph W. Stewart, Clerk.

Upon consideration of petitioners' petition for a rehearing in banc, and of respondent's answer thereto, it is

ORDERED by the Court that the aforesaid petition for a rehearing in banc be, and it is hereby, denied.

PER CURIAM.

Dated: March 12, 1954.

Chief Judge STEPHENS did not participate in the foregoing order.

The Government's petition for a review of the Tax Court's redetermination of the basic "coverage" issue having thus been twice rejected by the Court of Appeals, first by the division which wrote the original opinion, and later by the full court, sitting *en banc*, the Government nevertheless then filed the petition for a writ of certiorari which is now before this court. Once again, it contends, upon substantially the same grounds, that the decision of the Court of Appeals in this case is in conflict with prior decisions of the same court, and, therefore, that the petition for a review should not have been dismissed for want of jurisdiction.

In view of all these circumstances, we respectfully submit that the question presented in the petition is so unsubstantial as not to require further argument.

2. Another and equally compelling reason why the petition for a writ of certiorari filed herein should be denied is that it is not based upon any of the grounds enumerated in Rule 19(1) of this court, or on any grounds of like character. To the contrary, it will be noted that the Solicitor General does not contend, nor even suggest, that the decision below is erroneous, as a matter of law; nor does he indicate whether, if the petition were granted, he would urge that the decision be reversed. It is only reasonable to assume, therefore, that the Solicitor General is convinced that, as a matter of law, the decision below is correct and, if reviewed, that it should be affirmed. His only complaint seems to be that in *other* cases previously decided by the *same* court, aggrieved contractors and subcontractors have *erroneously*, been accorded more favorable treatment by the court. This is not true, but, even if it were, that would not constitute a valid

reason for asking this court to review a case which has been decided correctly and, admittedly, in accord with the Government's own consistent interpretation of the "finality clause" of the Renegotiation Act.

3. It is also apparent that the several reasons advanced by the Government in support of its petition to this court lack substantial merit, mainly because they are based upon an erroneous and strained analysis of the lower court's decision in this and prior cases.

First, the Government purports to find a conflict between the decision of the Court of Appeals in this case, decided by a division of the court consisting of Circuit Judges Clark, Prettyman, and Washington, and the decisions of other divisions of the same court, with a resulting "unequal application of the law" as between the Government and its contractors. In support of this contention the Government points out that the Court of Appeals for the District of Columbia Circuit has, *over the Government's opposition*, repeatedly insisted that it has power to review Tax Court renegotiation decisions on "constitutional" and "jurisdictional" grounds; and for that reason the Government felt justified in seeking a review of the Tax Court's determination that Respondent's charter was not renegotiable. But, the fallacy of this reasoning lies in the fact that, in order to bring its case within the scope of the lower court's self-imposed limited jurisdiction, as established by the court in prior decisions, it was necessary for the Government to contend that a determination by the Tax Court on a question of "coverage" was also a determination of a "jurisdictional" question and, therefore, reviewable. However, this contention was properly rejected by the Court of Appeals, for the reason that *this* court had already held

in *Macauley* v. *Waterman, supra*, that a determination as to whether a contract is or is not covered by the Act is an essential part in determining the amount of a contractor's alleged excessive profits, and, therefore, clearly within the jurisdiction of the Tax Court.

The Government also contends that the decision below results in "an unequal application of the law" as between the Government and its contractors, but there is simply no basis for such a contention. The reported decisions show that in all cases arising under the Renegotiation Act the Court of Appeals for the District of Columbia Circuit has uniformly applied the same rule, *i.e.*, that it will review only "constitutional" or "jurisdictional" questions, and that it will not review any question pertaining to the "amount" of a contractor's alleged excessive profits. The same rule was applied by the court in this case, with the result that the Government's petition for review was likewise dismissed for lack of jurisdiction, because it failed to raise any "constitutional" or "jurisdictional" issue.

But, even if it were true that the decision of the Court of Appeals in this case conflicts with other decisions of the same court in prior cases, that alone would not be a valid reason for granting a petition for a writ of certiorari. In such instances, the proper remedy, invoked by the Government in this proceeding, is the filing of a petition for a rehearing by the Court of Appeals, *en banc*. Then, if there is any such inconsistency or intra-circuit conflict of views, the full court will presumably resolve the conflict, in an *en banc* decision, or state publicly that the conflict cannot be resolved. In the latter event, it might be appropriate for this court to exercise its supervisory authority and resolve the conflict. But, where as in this case the supposed conflict is called to the attention of the court, by the filing of such a petition for a rehearing, *en*

banc, and a rehearing is denied by the court, *en banc,* it should be assumed either that the court did not consider that such a conflict existed, or that they were satisfied to let the most recent decision stand as the law of the circuit.

The second reason advanced by the Government in support of its petition is that the opinion below "misapplies" this court's language in *Macauley* v. *Waterman S.S. Corp.,* 327 U. S. 540, 544. This point was also raised by the Government in its petition for a rehearing *en banc,* and was presumably rejected by the court.

Moreover, an analysis of the decision below establishes that there is no basis whatsoever to support this alleged error. Actually, the question which the Court of Appeals was called upon to decide was relatively simple, and the answer was fairly obvious. By reason of a long line of cases, starting with *U. S. Electrical Motors, Inc.* v. *Jones,* 153 F. 2d 134, it is the settled law of the District of Columbia Circuit that the Court of Appeals' jurisdiction to review determinations of the Tax Court in renegotiation cases is limited, by the Renegotiation Act itself, to a review of questions pertaining to the constitutionality of the Act and the jurisdiction of the Tax Court, questions subsequently referred to by the court as "constitutional" and "jurisdictional" questions. Therefore, because it was obvious that no "constitutional" issue was involved, the only question to be decided by the court was whether the Government's petition for review presented a "jurisdictional" issue, and it was only in connection with that narrow point that the court referred to and applied the opinion of this court in *Macauley* v. *Waterman, supra,* which held that questions of "coverage" are vested by the Act within the "exclusive jurisdiction" of the Tax Court, "for a decision as to what are or are not negotiable contracts is an essential

part in determining the amount of a contractor's excessive profits."

The exclusive jurisdiction of the Tax Court to hear and redetermine questions of coverage—as an "essential part" of its power and duty to redetermine the amount, if any, of an aggrieved contractor's alleged excessive profits—having thus been settled by this court, it was apparent that the Tax Court had not exceeded its statutory jurisdiction in this case. Therefore, it was clear that the Government's petition for review did not present any "jurisdictional" issue, within the meaning of the lower court's prior decisions, and the petition for review was accordingly dismissed.

Any other interpretation of the lower court's application of *Macauley* v. *Waterman* would require a distortion of the opinion, particularly since the lower court specifically noted that in the earlier case this court had expressly stated that it was not deciding whether decisions of the Tax Court on coverage questions are "final".

As a third reason in support of the petition, the Government asserts that the division of the Court of Appeals which decided this case failed to appreciate that its decision is in conflict with prior decisions of other divisions of the same court. This point, as noted above, was specifically called to the court's attention, and if there ever was any doubt about it, it was resolved by the court below when, sitting *en banc*, it denied the Government's petition for a rehearing.

The fourth and last reason advanced by the Government in support of the petition is that now, some 12 years after the Act became effective, this court should establish uniform principles determining when decisions of the Tax Court may or may not be reviewed by the courts of appeals. Such a suggestion might well have had merit 10 years ago,

and the Government could probably have obtained such a ruling if it wanted it then. But, the Government effectively opposed all attempts to have this court pass upon the question, and there now appears to be no sound reason why this court should intervene at this late date, after all but a relatively few of the thousands of wartime contracts have been renegotiated without benefit of such uniform principles. If the Government believes that such a rule would be beneficial in the administration of the Renegotiation Act of 1951, as amended and extended to date, it should seek it in some case arising under that Act. Principles of procedure applicable to the administration of the 1942 Act would have little, if any, value in the administration of the later Acts.

In short, we submit, the reasons advanced by the Government in support of the petition for certiorari are not sufficient to sustain the petition.

4. Finally, we submit that the granting of a writ of certiorari in this case would serve no useful purpose. Section 403(c)(1) of the Renegotiation Act of 1942, as amended, specifically and without qualification provides that upon the filing of a petition for review with the Tax Court——

> ". . . such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as to the amount of excessive profits an amount either less than, equal to or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review

> the determination of the Board or the Secretary, but shall be treated as a proceeding *de novo*."

In view of this unequivocal language we do not believe there can be any reason to doubt that Congress intended the Tax Court to have not only *exclusive* jurisdiction, but also *unreviewable* jurisdiction, to redetermine the "amount" of any aggrieved contractor's alleged excessive profits. Therefore, since this court determined in *Macauley* v. *Waterman* that a determination as to what are or are not negotiable contracts is an essential part in determining the "amount" of a contractor's alleged excessive profits, it would seem to follow that redeterminations of such "coverage" questions by the Tax Court are equally final and unreviewable "by any court or agency," except, of course, where it is alleged that the Tax Court has *exceeded the limits* of its statutory authority.

Conclusion.

For the above reasons, Respondent respectfully submits that the Government's petition for a writ of certiorari should be denied.

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BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 263

THE UNITED STATES OF AMERICA and THE SECRETARY OF COMMERCE, as Successor of the Chairman of the United States Maritime Commission,

Petitioners,

v.

CALIFORNIA EASTERN LINE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE RESPONDENT

THE QUESTIONS PRESENTED

Expressed in the terms and circumstances of the case, without unnecessary detail, the questions presented for review in this proceeding are:

1. Whether a final order and decision of The Tax Court of the United States, determining after a hearing conducted pursuant to Section 403(e) of the Renegotiation Act of 1942, as amended, 50 U. S. C. App. §1191(e), that the only contract involved was not in fact a contract with

any of the "Departments" named in the Act and is not covered by the Act, is subject to direct review by any other court or agency, upon the petition of the Government.[1]

2. If it is reviewable, which respondent denies, whether it is reviewable *directly* by the United States Court of Appeals for the District of Columbia Circuit.

3. Whether the petition for review filed in this case was correctly dismissed by the Court of Appeals.

Statement of the Case.

The following statement of the case contains, in the opinion of respondent, all that is material to the court's consideration of the above questions:

(a) *The Basic Facts.*

The controlling facts, stipulated by the parties and found by the Tax Court as stipulated (R. 279), are the same as those considered by this Court in *Macauley* v. *Waterman S. S. Corp.*, 1946, 327 U. S. 540.

California Eastern Line, Inc., the respondent herein, is a corporation organized under the laws of Delaware, and has its principal office in Vancouver, Washington. Effective March 16, 1942, it acquired all the assets and assumed all the liabilities of an Oregon corporation of the same

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[1] Throughout this brief, unless otherwise specified, the terms "Renegotiation Act" and "the Act" refer to the Renegotiation Act of 1942, as amended (Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress), approved July 1, 1943; and by Public 149, 78th Congress, approved July 14, 1943.)

name. For convenience, the term "respondent" when used herein refers to the Oregon corporation as to all events occurring before March 16, 1942, and to the Delaware corporation as to all events occurring thereafter (R. 39).

Respondent owned an American-flag steamship called the *Vermont*, which it normally operated for its own account in the United States intercoastal trade (R. 41). However, by an agreement in writing dated May 29, 1941, respondent as owner of the *Vermont* entered into a contract (designated therein and hereinafter referred to as a "charter") with the British Ministry of War Transport, an agency of the British Government. The charter (Ex. A, R. 15) stated that it was an agreement "between CALIFORNIA EASTERN LINE, INC. Owners of the Steamship *Vermont* • • • and BRITISH MINISTRY OF WAR TRANSPORT Charterers". It was executed for and on behalf of respondent and the British Ministry of War Transport by their duly authorized representatives (R. 16-24, 39-40, 51).

The charter[2] provided, among other things, as follows:

> 1. That the said steamship • • • shall load at not more than two United States Atlantic Coast ports, north of Cape Hatteras, but not east of Portland, Maine, according to custom of port, a cargo of lawful merchandise, which Charterers shall furnish subject to Clause 25, and being so loaded shall therewith proceed as ordered when Bills of Lading are signed to not exceeding two ports of discharge in the Gulf of Aden and the Red Sea range not beyond Suez, or so near thereunto as she may safely get, and there,

[2] The form of charter party executed by respondent and the British Ministry of War Transport was a standard form of charter approved by the Maritime Commission on May 29, 1941, "for use by private owners of American-flag vessels in chartering their vessels to the British Ministry of War Transport" (Exhibit 40, R. 95-98). The charter considered by this court in the *Waterman* case was on the same form.

> always afloat, deliver the cargo as customary, at such wharf, dock or other good and safe place as Charterers' Agents may direct on arrival, in consideration whereof Charterers shall pay the vessel freight as follows:
>
> * * * * * *
>
> 28. This charter not to become effective until approved by the United States Maritime Commission. If any dispute arises under this charter the same is to be settled by the United States Maritime Commission.

After the charter was signed by the parties, it was forwarded to Washington for approval by the Maritime Commission, as required by Clause 28. There it was "approved" by G. H. Helmbold, who, as Director of Operations and Traffic of the Maritime Commission, was authorized by the Commission to approve such charters "on behalf of the Commission." Such authority was granted to Helmbold in a special resolution adopted by the Commission at a meeting held in Washington on May 29, 1941 (Exhibit 40; R. 40, 95-98). The resolution, among other things, provided:

> RESOLVED, FIRST, that the form of charter annexed hereto be, and the same is hereby approved, for use by private owners of American-flag vessels in chartering their vessels to the British Ministry of War Transport * * *
>
> RESOLVED, SECOND, that approval of specific charters under Clause 28 thereof with respect to voyages thereunder, now or hereafter arranged for by the Commission, may be given on behalf of the Commission by (1) the Director of Operations & Traffic [Mr. G. A. Helmbold] * * *
>
> * * * * * *

RESOLVED, FIFTH, that the approval of the Maritime Commission as required by Sections 9 and 37 of the Shipping Act, 1916, as amended, be and is hereby granted for the charter of privately-owned American flag vessel to the British Ministry of War Transport, on condition that said charter shall be approved as authorized by RESOLVED SECOND hereof, and upon the further condition that said vessels may not be sub-chartered to aliens under this approval;

The *Vermont*, having loaded the cargo furnished to her at the port of New York by the British Ministry of War Transport, sailed on May 29, 1941, and proceeded as ordered by the charterers to Port Sudan, a port in the Red Sea Range, and there delivered her cargo as directed by the charterers' agents. Delivery of the cargo at Port Sudan was completed on August 8, 1941 (Jt. App. 40).

Meanwhile, on June 23, 1941, respondent received full payment of the agreed freight payable by the charterers, in the sum of $336,577. Said freight was paid to respondent by the Maritime Commission from lend-lease funds, pursuant to an inter-governmental arrangement between the Office for Emergency Management, an agency of the United States Government, and the British Merchant Shipping Mission, another agency of the British Government, "with respect to payments required to be made by the British Ministry of War Transport under the form of charter party prepared by the Maritime Commission" for use in the proposed Red Sea service. Under the terms of said inter-governmental arrangement, which was set forth in a letter dated June 9, 1941, from Major General J. H. Burns of the (U. S.) Office for Emergency Management, to the British Merchant Shipping Mission, it was agreed *between the two governments* that—

> a. The United States Maritime Commission will make the following payments required to be made to the owners or chartered owners by the British Ministry of War Transport under the terms of the charter: • • •

Respondent was not a party to this inter-governmental arrangement, nor was it consulted by either government as to its terms and conditions (Exhibit 48: R. 40, 105-106).

Subsequently, on July 31, 1942, respondent received a payment of $14,700 on account of demurrage; and, on November 4, 1942, a payment of $295.78, on account of crew's overtime. These amounts, also payable by the charterers, were in each instance paid by the Maritime Commission from lend-lease funds, pursuant to the aforesaid inter-governmental arrangement (R. 40-41).

(b) *The Renegotiation Proceedings.*

On November 29, 1943, respondent received a letter from the Maritime Commission, dated November 27, 1943, signed "John R. Paull, Price Adjustment Board," and captioned: "Subject: *Notice of Initial Conference under the Renegotiation Act which shall constitute Commencement of Renegotiation*" (Ex. 2; R. 41, 51-53).

In said letter respondent was informed that Price Adjustment Boards had been established in the War, Navy, and Treasury Departments, the Maritime Commission, the War Shipping Administration, and the Reconstruction Finance Corporation, pursuant to the Renegotiation Act; that renegotiation of respondent had been assigned to the Commission's Price Adjustment Board; and that "an initial conference" with the Board had been set for December 20, 1943, in Washington, D. C. Respondent was requested to furnish the Board with a detailed breakdown of its income

and expenses during the calendar years 1941 and 1942, with special reference to the charter of the *Vermont*.

Respondent immediately challenged the Commission's right to renegotiate the profits it had derived from its charter with the British Ministry of War Transport, on the ground that the charter was a contract *with a foreign government,* not with the Maritime Commission or any other Department named in the Renegotiation Act. Respondent asserted, moreover, that it had not derived any excessive profits under the charter, but, even if the charter were a contract with the Maritime Commission, the contract would be exempt from renegotiation by the Commission—*first*, because "final payment" pursuant to the contract was made prior to April 28, 1942, and, *second,* because the proposed renegotiation proceeding had been commenced more than one year after the close of respondent's fiscal year within which "completion" of the contract occurred. All of these objections were overruled, however, and the Commission's Price Adjustment Board declared its intention to proceed with the renegotiation, asserting that the charter was *in fact* a contract with the Maritime Commission and, therefore, subject to renegotiation by the Chairman.

At about the same time, similar notices of initial conferences were sent to other shipowners who had chartered their vessels to the British Ministry of War Transport. One of these was Waterman Steamship Corporation, who, when it became apparent that the Commission could not be persuaded to discontinue the proposed renegotiation of its charters to the British Ministry of War Transport, filed a complaint against the Chairman of the Commission, in the United States District Court for the District of Columbia. This was the complaint which was later to be

considered by this Court in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. Respondent filed a similar action in the District Court, but did not press its case pending a final decision in the *Waterman* case. When this Court determined that the District Court had properly dismissed Waterman's complaint for want of jurisdiction, because Waterman had not exhausted the administrative remedies provided for in the Renegotiation Act, respondent voluntarily discontinued its action in the District Court.

The Commission then proceeded with the renegotiation of respondent's charter with the British Ministry of War Transport, and on March 31, 1949, Admiral W. W. Smith, then Chairman of the Maritime Commission, issued and entered a unilateral order determining that respondent had realized excessive profits "under a contract with the Departments, as defined in the Renegotiation Act" (Ex. 3; R. 15-16, 53-54). Counsel for the parties to this proceeding have stipulated and agreed that "the aforesaid charter is the specific contract referred to in (the Chairman's) said order," and that said charter "was the only charter which (California Eastern Line, Inc.) signed with the British Ministry of War Transport for a voyage to the Red Sea area during 1941 or 1942" (Stipulation of Facts, pars. 10 and 15; R. 41-42).

(c) *The Tax Court Proceedings.*

Respondent, being aggrieved by the Chairman's unilateral determination of March 31, 1949, thereupon petitioned the Tax Court, under authority of Section 403 (c)(2) of the Renegotiation Act of 1943, for a redetermination of whether the profits it realized under the charter with the British Ministry of War Transport were subject to renegotiation under authority of Section 403 (c) (1) of the 1942 Act; and, if so, the amount (if any) of its excessive profits.

In its petition to the Tax Court (R. 4-24) respondent alleged, and asked the Tax Court to determine, that the Chairman of the Maritime Commission was not authorized by Section 403(c)(1) of the Act to renegotiate respondent's contract with the British Ministry of War Transport, because it was a contract only with a *foreign government*, not with the Maritime Commission or any other "Department" as defined in Section 403 (a) of the Act; that, even if the charter were a contract with one of the Departments named in the Act, it would be exempt from renegotiation, because (a) the "final payment" pursuant to the contract had been made prior to April 28, 1942, and (b) the purported renegotiation proceeding had not been commenced within one year after the close of respondent's fiscal year 1941, during which the "completion or termination" of the contract occurred; and finally, that no portion of the profits realized under the contract was "excessive" within the meaning of the Act.

When an answer was filed on behalf of the Chairman, respondent moved for, and the Tax Court granted, a severance of the so-called "coverage issues" (R. 25-31, 38). These issues, as stated in the "Agreed Statement of Issues and Stipulation of Facts" submitted to and accepted by the Court (R. 38, 182) were:

> (a) Was the charter dated May 29, 1941, between the petitioner and the British Ministry of War Transport a contract, or a subcontract thereunder, with a "Department" as defined in Section 403 (a) of the Renegotiation Act of 1942, as amended?
>
> (b) Was the final payment pursuant to said charter, within the meaning of Section 403 (c) (6) of the Act, made prior to April 28, 1942?
>
> (c) Was the renegotiation proceeding involved herein commenced by the respondent within one year

after the close of the fiscal year of the petitioner within which completion or termination of said charter occurred, within the meaning of Section 403 (c) (6) of the Act?

(d) Was the charter subject to renegotiation?

As the Tax Court pointed out in its Findings of Fact and Opinion, a determination of any of these issues in respondent's favor "obviates consideration of those remaining, and requires decision for" respondent (R. 279).

A formal hearing with respect to these agreed "coverage issues" was conducted by Judge Raum on March 16, 1951, who, after hearing both sides, reserved decision not only on the merits of the controversy, but also as to the admissibility of certain exhibits.

On February 1, 1952, Judge Raum entered a formal order with respect to the disputed exhibits, admitting some but excluding others, and on February 15, 1952, the Tax Court promulgated its Findings of Fact and Opinion, written by Judge Raum but "reviewed by the Court," in which the Court, after weighing all of the evidence (including the *excluded* exhibits) and making numerous subsidiary findings of fact, found as ultimate facts that:

> The charter of the *Vermont* was neither a contract with the Commission or with any other department named in the Renegotiation Act, nor a subcontract under such a contract. The contract contained in that charter was only between petitioner and the Ministry of War Transport, acting for the British Government. The Commission did not intend itself to be a party to that contract or to be the charterer of the *Vermont*. In entering into that contract and in chartering the *Vermont*, neither the British Government nor the Ministry of War Transport acted as agent for the Commission (R. 288).

Later, in his opinion (R. 289-300), Judge Raum said:

> (The Government's) contention, that the British Ministry acted as the Commission's agent and that the Commission was the charterer of the *Vermont*, is based on the facts that the Commission negotiated the terms and form of the charter, exercised supervision over performance under the charter, and, in behalf of the United States Government, furnished the funds and controlled payment under the charter. We think it does not necessarily follow, under the Renegotiation Act, that these circumstances stamped the charter as being a contract with the Commission. The question of fact remained whether on the entire evidence the charter was such a contract. As the repository of these very important powers, the Commission might have chosen in some circumstances to charter the Vermont itself, making all other arrangements substantially the same as it did here, and to undertake transportation of the British cargo to the destinations at which it was required. Whatever the reasons may have been, whether because of lack of authority or because of restrictions on its action which exigencies of the international situation then imposed on the United States as a non-belligerent, the fact is that the Commission avoided selection of this course. It chose rather that in which the British Ministry was the charterer and in which the contract was with the British Ministry; to itself the Commission relegated the function of making the arrangement and tending to other matters in a way which would make it possible for the British Ministry to charter the *Vermont*. The contract in fact was, and was intended to be, with the British Ministry and not with the Commission. Cf. *Waterman S.S. Corporation* v. *Land*, 151 F. 2d 292, 293-296 (C. A. D. C.), reversed on other grounds, sub. nom. *Macauley* v. *Waterman S.S. Corp.*, 327 U. S. 540; *Alabama* v. *King & Boozer*, 314 U. S. 1, 13; *United*

States v. *Algoma Lumber Co., supra; Farm Security Administration* v. *Herren, supra.*

Then, pursuant to its Findings of Fact and Opinion, the Tax Court entered a formal decision on February 26, 1952, as follows (R. 302):

> Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated February 15, 1952, it is
>
> ORDERED and DECIDED: That there is no renegotiable contract within Section 403(c)(1) of the Renegotiation Act.

(d) *The Court of Appeals' Proceedings.*

The administrative process prescribed by the Renegotiation Act having been completed, by the entry of the aforesaid final order and decision of the Tax Court, the petitioners, purporting to proceed under Sections 1141 and 1142 of the Internal Revenue Code, 26 U. S. C. A. 1141 and 1142, thereupon initiated this judicial proceeding by filing with the United States Court of Appeals for the District of Columbia Circuit a petition for review (R. 302-305), praying that the Court of Appeals review the decision of the Tax Court and that the same "be reversed." (R. 305)

Article V of the petition for review alleged that the Tax Court committed error in the following respects:

> (a) In deciding that pursuant to the determination of the Court set forth in its Findings of Fact and Opinion, respondent-appellee had no renegotiable contract within Section 403(c)(1) of the Renegotiation Act.
>
> (b) In finding and holding that the contract involved herein was neither a contract with the United States Maritime Commission or with any other department named in the Renegotiation Act.

(c) In finding and holding that the contract involved herein was a contract between respondent-appellee and the Ministry of War Transport, acting for the British Government.

(d) In finding and holding that the United States Maritime Commission did not intend itself to be a party to the contract involved herein or to be the charterer of the vessel *Vermont* under such contract.

(e) In finding and holding that neither the British Government nor the Ministry of War Transport acted as agent for the United States Maritime Commission in entering into the contract involved herein or in chartering the vessel *Vermont*.

(f) In issuing its order dated February 1, 1952, in which it was ordered that respondent-appellee's objections to the admission in evidence of petitioner on review's Exhibits G and H were sustained, and that Exhibits G and H are not admitted in evidence.

(g) In failing to find and hold that it was the intention of both the United States Maritime Commission and the British Ministry of War Transport that the British Ministry of War Transport act as an agent of the United States Maritime Commission in signing the contract involved herein.

It should be noted that the alleged errors fall into three groups. Error (a) is undoubtedly a mere formal allegation, for the Government cannot suggest that, if the Tax Court's findings of fact are correct, the charter is subject to renegotiation. There was no authority whatsoever for the Chairman of the Maritime Commission to renegotiate the profits realized by an American corporation from a contract with an agency of a foreign government, even though the contract price was paid from lend-lease appropriations.

Errors (b), (c), (d) and (e) clearly relate to the Tax Court's *findings of fact,* which are certainly not subject to review in a renegotiation case. Similarly, error (g) relates to *an issue of fact,* since it merely represents the negative of errors (b), (c), (d) and (e); and error (f) pertains only to an alleged error in a ruling upon a disputed question of evidence.

After a hearing on the record from the Tax Court, the Court of Appeals held, in an opinion by Judge Prettyman (R. 335-339), that the petition for review "must be dismissed for lack of jurisdiction," and ordered, that "the petition for review in this case be, and the same is hereby, dismissed for lack of jurisdiction" (R. 340). Petitioners promptly moved for a rehearing of the issues by the entire court, sitting *en banc,* on the ground that the court's decision was inconsistent with all prior decisions of the court; but the court, sitting *en banc* (with the exception of Chief Judge Stephens who did not participate) denied the motion (R. 341). This action may reasonably be taken to indicate that the Court of Appeals did not consider the decision in this case to be inconsistent with its prior decisions, as alleged by the Government.

Petitioners then filed their petition for a writ of certiorari, which was granted and is now before this Court.

Summary of Argument.

Briefly, respondent contends that the judgment of the Court of Appeals for the District of Columbia Circuit, dismissing the Government's petition for review for lack of jurisdiction, should be affirmed for the following reasons:

I. Section 403(c) of the Renegotiation Act, 50 U. S. C. App. §1191(c), which confers upon the Tax Court "exclu-

sive jurisdiction, by order, to finally determine the amount, if any, of" an aggrieved contractor's alleged excessive profits, specifically provides that "such determination [of the Tax Court] shall not be reviewed or redetermined by any court or agency." This Court held in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, that the aforesaid "exclusive jurisdiction" of the Tax Court includes the power to decide questions of coverage, "for a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits."

Since the Act explicitly prohibits any direct judicial review of such determinations of the Tax Court, the Government's petition for a direct review by the Court of Appeals of the basic question of coverage raised by respondent in this case was correctly dismissed by the Court of Appeals, for lack of jurisdiction.

II. The legislative history of the Renegotiation Act shows a clear intent on the part of Congress to endow the Tax Court with final authority to decide all questions of fact and law which may arise during the course of a renegotiation proceeding, and it intentionally made no provision for a direct review of the Tax Court's decisions.

III. While this Court has never squarely decided whether and under what circumstances, if any, decisions by the Tax Court of such "questions of coverage" may be subject to direct judicial review, it did recognize in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, that Congress clearly "intended to endow the Tax Court's decisions with a very large degree of finality." It has been specifically held by two courts of appeals, moreover, that decisions of the Tax Court in respect to questions of coverage are not subject to direct judicial review.

In *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, the Court of Appeals for the Ninth Circuit upheld *the contention made by the Government* in that case that such decisions of the Tax Court are not subject to direct judicial review under any circumstances. In the District of Columbia Circuit the "finality clause" of the Renegotiation Act has also been construed to prohibit direct review of any decision by the Tax Court, except in respect to rulings of the Tax Court on "constitutional" or "jurisdictional" questions. *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134; *Psaty & Fuhrman* v. *Stimson*, 182 F. 2d 985; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405; *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Board*, 195 F. 2d 198.

The decision of the Court of Appeals in this case, therefore, is not in conflict with any decision of this Court or with the rulings of the aforesaid courts of appeals with respect to questions of coverage.

IV. The petitioners' brief fails to sustain their contention that the judgment of the Court of Appeals should be reversed, and their proposed rule of reviewability would be in direct conflict with the "finality clause" of the Renegotiation Act.

V. The judgment of the Court of Appeals should be affirmed.

I.

THE RENEGOTIATION ACT PROHIBITS ANY DIRECT REVIEW OR REDETERMINATION OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE TAX COURT IN THIS CASE.

(a) *Introduction.*

The ultimate question to be decided by this Court is whether the Government's petition for a review of the Tax Court's determinations of fact and law relevant to the coverage issue in this case was properly dismissed by the Court of Appeals. To decide that question, however, it is first necessary to decide whether, as a matter of law, determinations of the Tax Court in respect to *coverage* issues may be reviewed or redetermined by *any* court or agency. If not, the judgment of the Court of Appeals was obviously correct and must be affirmed.

A subsidiary question, to be considered only if this Court first decides that such determinations of the Tax Court are subject to review or redetermination, would be whether they may be reviewed or redetermined, upon the petition of the Government, by the United States Court of Appeals for the District of Columbia Circuit.

In this first point it will be shown that the determinations made by the Tax Court *in this case* are not subject to review or redetermination by *any* court or agency

(b) *The Provisions of the Act.*

Section 403(c)(1) of the Renegotiation Act, as originally passed by Congress, provided that whenever, in the opinion of the "Secretary" of one of the "Departments" named in the Act, the profits realized or likely to be

realized from any contract with such a department, or from any subcontract thereunder, may be excessive, the Secretary is "authorized and directed to require the contractor or subcontractor to renegotiate the contract price;" and no provision was made for a review or redetermination of the Secretary's determinations. Later, however, Congress recognized that the unrestricted powers thus conferred upon the Secretaries of the named Departments might well be abused. Accordingly, in the Renegotiation Act of 1943, Congress provided for a "*de novo*" redetermination by the Tax Court, upon the petition of an "aggrieved contractor," of a Secretary's unilateral determinations (50 U. S. C. App. §1191(e)).

By Section 403(e) of the Renegotiation Act of 1943, which was made applicable to renegotiation proceedings commenced under authority of either the 1942 Act or the 1943 Act, it was provided that any contractor or subcontractor aggrieved by an order of a "Secretary," or of the newly created War Contracts Price Adjustment Board, determining the amount of excessive profits received or accrued by such contractor or subcontractor, might within ninety days file a petition with the Tax Court for a redetermination thereof. The statute further provided that:

> Upon such filing, such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency.

This language might have been construed to limit the Tax Court's jurisdiction to a redetermination of only the monetary "amount" of a contractor's excessive profits,

tions and by introducing the compulsion of finality at every stage unless each succeeding one is taken as commanded."

In *Lichter* v. *United States*, 334 U. S. 742 (1947), the case in which this Court first upheld the constitutionality of the Renegotiation Act, the Court again held that the Tax Court has exclusive jurisdiction to "finally determine" questions of coverage arising under the Renegotiation Act, questions as to the amount of excessive profits adjudged to be due from the contractors, and questions as to other comparable issues, all of which the Court found to be within the jurisdiction of the Tax Court, upon the filing of a timely "petition for a redetermination of excessive profits, if any."

In view of these decisions, it is apparent that there is no conflict between the decision of the Court of Appeals in this case and the opinions expressed by this Court in respect to the "finality clause" of the statute.

The Government purports to find an inconsistency between the decision of the Court of Appeals in this case and certain prior decisions of the same Court in other renegotiation cases. The fact is, however, that the decision in this case followed and is wholly consistent with the lower court's prior decisions holding that it may not and will not review questions of coverage decided by the Tax Court in cases arising under the Renegotiation Acts.

As noted in the decision below, the Court of Appeals for the District of Columbia Circuit has held several times that in renegotiation cases it may review directly decisions of the Tax Court only in respect to "jurisdictional" and "constitutional" questions. Thus, in *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134, the case in which the lower court first held that it had limited jurisdiction to review directly decisions of the Tax Court in renegotiation cases, the court said (p. 136):

and to preclude any redetermination of the Secretary's determinations of fact and law in respect to questions of coverage. If so construed, there might be some merit to the proposal made by the Government in this case, that the "finality clause" of the Act should be held applicable only to such monetary redeterminations. But, such a literal construction of the language was expressly rejected by this Court in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. There, in an opinion by Mr. Justice Black, the Court said (pp. 544-545):

> Section 403(e)(1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * *." Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act. In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the *Myers* case, the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act.

> "Respondents [the Government] argue that the Renegotiation Act forbids judicial review of any act of the Tax Court in a renegotiation case. The Act does not so read. It very carefully says the Tax Court shall have exclusive jurisdiction to determine the amount of excessive profits. It leaves untouched, by direct reference or otherwise, the remaining content of Section 1141(a) of the Internal Revenue Code. We think, therefore, that *the statute places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination*, but that a ruling upon *the jurisdiction of the Tax Court* is untouched by that provision and, therefore, remains reviewable by this court. It would, we think, require clear language to indicate that Congress intended that any tribunal should have unreviewable authority to determine its own jurisdiction."

It is unnecessary to decide now whether the Court of Appeals was correct in holding "that a ruling upon the jurisdiction of the Tax Court • • • remains reviewable by this Court." The present case does not involve any such ruling by the Tax Court in respect to the extent of its own "exclusive jurisdiction, by order, to finally determine the amount" of an aggrieved contractor's excessive profits. Moreover, this Court has held on several occasions that the Tax Court has such jurisdiction. The significance of this Court of Appeals' decision is that it held, as respondent contends here, "*that the statute places exclusive and unreviewable jurisdiction* in the Tax Court to determine *the amount* of excessive profits, *including questions* of *both law and fact* in such determination."

In a subsequent case, decided after this Court decided *Macauley* v. *Waterman*, the Court of Appeals more specifi-

Then, about a year later, in *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, this Court said in an opinion by Mr. Justice Rutledge (p. 755):

> In one other case, *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540, constitutionality was not involved, but coverage of the Renegotiation Acts was put in issue. The suit was brought in a District Court for a declaratory judgment and to restrain further renegotiation proceedings affecting the specified contracts. *The contractor had not sought a decision on coverage from the Tax Court. We held that the Tax Court has power to decide such questions in the proceedings authorized by §403(e)(1) of the Second Renegotiation Act.* Hence, under the authority of *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, the complaint in the *Waterman* case also was held rightly to have been dismissed, in this instance for the plaintiff's failure to exhaust its administrative remedy. (Italics supplied.)

Thus, so far as the issues in this case are concerned, it has already been decided by this Court that under the provisions of Section 403(e) of the Act the Tax Court had "exclusive jurisdiction, by order, to finally determine" all coverage questions submitted to it, including the basic issue of whether respondent's Red Sea charter was *in fact* a "contract with a Department," subject to renegotiation under authority of Section 403(c)(1) of the 1942 Act. That being so, it is necessary for this Court to decide now only whether the Tax Court's redetermination of that basic question of coverage was final and binding upon the Government, or whether it is subject to further direct judicial review by the United States Court of Appeals for the District of Columbia Circuit, upon the petition of the Government.

cally defined what constituted "a ruling upon the jurisdiction of the Tax Court." In *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board,* 192 F. 2d 405, the Court said (p. 407):

> "We think that a question whether a certain contract is within those to be renegotiated is a question of coverage, but that a question whether the Board has any power whatever over a particular company, apart from the nature of its contracts, is a question of jurisdiction."

Again, for the purposes of this case, it is unnecessary to decide whether the distinction made by the Court of Appeals in the *Lowell* case is entirely correct. It is sufficient that the Court held "*that a question whether a certain contract is within those to be renegotiated is a question of coverage,*" and, therefore, under the decision of this Court in *Macauley* v. *Waterman,* clearly within the exclusive and unreviewable jurisdiction of the Tax Court.

In other cases, the Court of Appeals has undertaken to decide whether certain disputed issues were questions of "coverage" or questions of "jurisdiction." The Government contends here that some of those decisions are "inconsistent" with the decision in this case. We do not believe so, but the other cases are not before the Court in this proceeding, and the fact remains, that the Court of Appeals has consistently ruled that, if a petition for review does not present any "constitutional" or "jurisdictional" question, it will be dismissed by the Court for lack of jurisdiction, *Psaty & Fuhrman* v. *Stimson,* 182 F. 2d 985. Likewise, the Court of Appeals has never undertaken to review as a "question of jurisdiction" the issue raised here of whether a certain contract is subject to the Act.

But, even if there were any inconsistency between the decisions of the Court of Appeals, the fact that the entire

(c) *The Finality of Tax Court Determinations.*

The answer to the question, we submit, is provided by the unqualified language of the Act. Section 403(e) provides, in the clearest language possible, that: "Upon such filing, such court shall have exclusive jurisdiction, by order, *to finally determine the amount,* if any, of such excessive profits received or accrued by the contractor or subcontractor, *and such determination shall not be reviewed or redetermined by any court or agency.*"

The Government concedes that a determination of the Tax Court in respect to the monetary amount of a contractor's excessive profits is not subject to review or redetermination by any court or agency, because of the above-quoted language, and we agree. The Government denies, however, that the same "finality" should be accorded to the subsidiary findings of fact and conclusions of law in respect to "coverage issues," which the Tax Court is obliged to make in every case in order to redetermine the monetary amount of a contractor's excessive profits, if any.

The Government's position is patently illogical. Since this Court held in *Macauley* v. *Waterman* that a determination of the so-called "coverage issues" is "an essential part in determining the [monetary] amount of a contractor's excessive profits," and since the Government concedes that the Tax Court's determination in respect to the monetary amount of a contractor's excessive profits is not subject to review or redetermination, it necessarily follows that the subsidiary determinations of the Tax Court in respect to the coverage issues are likewise not subject to review or redetermination. It would be clearly erroneous and illogical to construe the "finality clause" of the Act as authorizing a review of the Tax Court's determinations of fact and law in respect to the "coverage issues" but as prohibiting, in

Court sitting *en banc* (only Chief Judge Stephens being absent) refused to grant a rehearing *en banc* of its decision in this case, indicates that the entire Court was satisfied that the decision in this case was correct. Hence, so far as the narrow issue in this case is concerned, the law of the District of Columbia Circuit has been settled by the action of the Court itself.

Nevertheless, petitioners assert in their brief (p. 14) that certain statements have since been made from the bench during the course of subsequent arguments, indicating disagreement with the limited scope of review recognized in the instant case. Petitioners do not specify what statements were made, nor by whom they were made. Obviously, therefore, respondent is in no position either to challenge petitioners' interpretation of the statements or to deny that they were made. It is interesting to note, however, that according to petitioners' footnote 11, at the bottom of page 14, the four judges who heard one or more of the oral arguments in the cases mentioned were Judges Edgerton, Miller, Bazelon and Fahy, each of whom joined in the Court's order denying a rehearing of the case *en banc* (R. 341). It is only reasonable to assume, therefore, that whoever reported the statements must have misinterpreted them. In any case, of course, such statements are wholly irrelevant to a determination of the issues in this case.

The rule adopted in the Ninth Circuit, in *French* v. *War Contracts Price Adjustment Board,* 182 F. 2d 560, is even more favorable to the respondent's contention that the Court of Appeals correctly dismissed the Government's petition for a review in this case. In that decision, the Court of Appeals for the Ninth Circuit applied the "finality

the same case, a review of its determination as to the monetary amount of the excessive profits, which would be necessarily based in part upon the Tax Court's determination of the coverage issues.

In short, it seems clear that the explicit language of the statute precludes a direct review or redetermination of Tax Court decisions in respect to the coverage issues submitted to it.

II.

THE CLEAR WORDING OF THE STATUTE PROHIBITING REVIEW OF THE TAX COURT'S REDETERMINATION IS SUPPORTED BY THE LEGISLATIVE HISTORY.

In *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, this Court noted "that Congress intended to endow the Tax Court's decisions with a very large degree of finality, as appears from the very terms of §403(e)(1), from the whole structure of the Act, and from the legislative history." Nevertheless, petitioners have devoted a considerable portion of their brief to arguing that the legislative history of the Renegotiation Act of 1943, as well as that of subsequent renegotiation statutes, lends support to the proposition that Congress intended, or must have intended, some sort of appellate review of the Tax Court's final determination, albeit the statute states that "such determination shall not be reviewed or redetermined by any court or agency".

It is submitted, however, that a careful examination of all that is quoted from the Congressional hearings, reports and debates on the bill, as well as of other legislative material not quoted in petitioners' brief, leads to exactly

clause" of the Renegotiation Act literally and, *upholding the contention made by the Government in that case,* dismissed a petition for a review of a Tax Court decision wherein an aggrieved contractor alleged that the services for which he was paid were not covered by the Act. The Court said (p. 561):

> "We think the Act prohibits the review absolutely because, (1) the Act affirmatively so provides, (2) if it does not so provide there is no provision in the Act for a review, (3) there is nothing in the provisions of the Tax Court statute which authorizes review or appeal of renegotiation cases from the Tax Court or any other court to the United States Courts of Appeals, (4) there is no general statute authorizing such review."

Therefore, although there is a conflict between the decisions of the Court of Appeals for the District of Columbia Circuit and that of the Ninth Circuit in respect to the direct reviewability of *constitutional* and *jurisdictional* questions, both courts agree that the "finality clause" of the Act precludes any direct review by a court of appeals of *coverage* questions.

In view of the foregoing, it seems quite clear that the decision of the Court of Appeals in this case is not inconsistent with any decision of this Court or with any decision of the lower court in respect to the question of whether there is any direct judicial review of "coverage issues."

The decision below, moreover, is in accord with the interpretation usually accorded by the courts to "finality" provisions of other statutes. For example, in *James F. Waters, Inc.* v. *C. I. R.*, 160 F. 2d 596 (9th Cir., 1947) and *Colonial Amusement Co. of Philadelphia* v. *C. I. R.*, 173 F. 2d 568 (3rd Cir., 1949), it was held that the "finality clause" of Section 732(c) of the Internal Revenue Code, 26 U. S. C.

the opposite conclusion. It would appear from what Congressional expression there is that Congress intended precisely what the act says—the Tax Court was to have exclusive jurisdiction, by order, to finally determine the amount, if any, of excessive profits, and this final determination of the Tax Court was not to be subject to review.

All the legislative history that we have been able to find on the subject supports the view that under the 1943 Act Congress intended only the Tax Court, on petition of an aggrieved contractor, to review the action of the departmental board, and that no further appeal or review beyond this Tax Court redetermination was contemplated. Indeed, the idea of further appellate review was suggested and rejected in the course of Congressional action.

It must be remembered that the 1942 Act provided for no review or redetermination whatsoever. As stated before the Congressional Committees, it may have been possible under the 1942 Act to collaterally attack a departmental board's final determination in the courts on constitutional grounds (although there was no general agreement as to this), but certainly there was no provision for direct appeal. That was what Sec. 403(c) of the 1943 amendment to the Act was designed to supply, and in its wisdom Congress decided to confine the appeal to a *de novo* proceeding in Tax Court, but it did not intend the appellate procedure to go any further.

The first evidence of intent appears in the Report of the Committee on Ways and Means on H. R. 3687, H. Report No. 871, 78th Congress, 1st Session, at pp. 57, 58, where it says:

> "The (tax) court is given exclusive jurisdiction to determine the amount of the excessive profits or

§732, precludes any judicial review of Tax Court decisions arising under Sections 711, 721 and 722 of the Code. A similar decision was rendered by the Court of Appeals for the Second Circuit in *George Kemp Real Estate Co.* v. *C. I. R.*, 182 F. 2d 847 (2nd Cir., 1950). In each of those cases, it was held that the general power of the courts of appeals to review Tax Court determinations in tax cases, conferred by Section 1141 of the Internal Revenue Code (26 U. S. C. §1141), was subordinate to the "finality clause" in Section 732(c).

Other cases of like effect are *Calderon* v. *Tobin*, 187 F. 2d 514 (C. A., D. C., 1951), certiorari denied 341 U. S. 935, where the finality clause contained in the Federal Employees' Compensation Act, 5 U. S. C. 793, was held to bar any judicial review of the Secretary's determinations; *Barnett* v. *Hines*, 105 F. 2d 96 (C. A., D. C., 1939), certiorari denied 308 U. S. 573 and *Peyton* v. *United States*, 100 F. Supp. 823 (Ct. Cl., 1951), certiorari denied 343 U. S. 909, where the finality provisions of the Veterans' Relief Act, 38 U. S. C. 705, were held to bar any judicial review. Similarly, this Court held in *Wilson & Co.* v. *United States*, 311 U. S. 704, that the finality clause of Section 601(a) of Title IV of the Revenue Act of 1936, which provided for refunds of certain processing and floor stock taxes, precluded a judicial review of the Commissioner's determinations.

Many other decisions to the same effect and involving various types of finality clauses might be cited here, but, in the final analysis, they all stand for the general proposition that administrative determinations are not subject to *direct* review by the courts when Congress has provided that such determinations shall not be subject to review or redetermination by any court or agency. Petitioners can hardly challenge this general proposition of law, for in most

> the fair price, as the case may be, and its determination is not subject to review or redetermination by any court or agency".

When the bill was being debated on the Floor of the House, Congressman Jenkins, a member of the Ways and Means Committee, in supporting a change in the 1942 law so as to provide Tax Court review of the departmental board's determination, stated:

> "* * * To this end we provide a court review. Most of those who complained were anxious for a court review of some kind. What we provide in this bill is not perfect but it is a great step in the right direction.
>
> * * * * * *
>
> "For fear that the Board will not take the fair and conciliatory attitude that the task requires, the committee has provided in this bill that the aggrieved party may carry his case to the Court of Tax Appeals for a review. This court will then hear the matter *de novo*, as the lawyers would say. That means the tax court would hear it all over from the beginning" 89 Cong. Rec. 9934.

So also Congressman Vinson, Chairman of the Naval Affairs Committee and a staunch advocate of renegotiation legislation, in discussing the necessity of some sort of appellate review of the departmental board's determination, said:

> "For the very reason that the present law is not clear as to the existence of a right of appeal to the courts, both the Ways and Means Committee and our committee have recommended the insertion of a provision in the law specifically conferring the right of appeal. We only differ as to the kind of an appeal that should be allowed. The Ways and Means

cases the Government is the party who insists on maintaining the sanctity of "finality clauses," just as they have been doing up to the present time in respect to the "finality clause" of the Renegotiation Act.

IV.

PETITIONERS' BRIEF FAILS TO SUSTAIN THEIR CONCLUSION THAT THE JUDGMENT OF THE COURT OF APPEALS IN THIS CASE SHOULD BE REVERSED.

Although petitioners' brief concludes with a prayer that the judgment of the Court of Appeals in this case be reversed and the case remanded to that court for a ruling as to the "correctness" of the Tax Court's decision, it is noteworthy that petitioners do not even suggest that the judgment of the Court of Appeals was erroneous as a matter of law. Instead, petitioners argue only that the judgment below was not "required" by any decision of this Court; that it is "inconsistent" with prior decisions of the Court of Appeals for the District of Columbia Circuit; and, that this Court should now interpret the "finality clause" of the Act as granting to the Court of Appeals for the District of Columbia Circuit *exclusive jurisdiction* to review directly all decisions by the Tax Court in respect to "constitutional" and "jurisdiction" questions.

Apart from the fact that these arguments do not appear to be relevant to the issue in this case of whether the judgment of the Court of Appeals was correct as a matter of law, they are wholly without merit because they do not even tend to prove that the decision below was erroneous.

We agree, of course, that the judgment of the Court of Appeals was not "required" by this Court's decision in

> Committee has recommended that review of the Board's decisions shall lie in a *de novo* proceeding before the Tax Court. While I am of the opinion that an entirely new hearing by the Tax Court, after the Board has already tried the case and handed down its decision, is wasteful of both public funds and manpower, the important thing is to assure some form of judicial review of the departmental decision. So long as judicial review of some sort is provided for, I am not disposed to quarrel over the form that that review will take. Accordingly, I urge that the Ways and Means Committee's recommendation in this respect be adopted" 89 Cong. Rec. 9936.

It is apparent from the above that these sponsors of the legislation in the House were concerned only with giving an aggrieved contractor some sort of review of the departmental board's determination. They agreed to place such a review exclusively in the Tax Court in a *de novo* proceeding. They made the Tax Court's order final and not subject to review. There is nothing in the report or debate to indicate that they intended going any further.

This intention of Congress to limit review of the departmental determination to a *de novo* proceeding in the Tax Court is confirmed by a discussion that occurred in 1945, when a one year extension of the 1943 Act was being considered, between Mr. Alvord, representing the United States Chamber of Commerce, and certain members of the Ways and Means Committee who had actively participated in the passage of the 1943 Act. *Hearings Before the Committee on Ways and Means on H. R. 2628*, 79 Cong., 1st Sess., pp. 174-194. In the course of his statement Mr. Alvord said (*Id.* at p. 175):

> "The Revenue Act of 1943 states specifically that the provisions relating to review by the appropriate

Macauley v. *Waterman*, standing alone. But, because the Court of Appeals had repeatedly held in prior decisions that it lacked jurisdiction to review directly decisions of the Tax Court except in respect to "constitutional" and "jurisdictional" questions, and because the decision of this Court in *Macauley* v. *Waterman* held that the basic issue in this case involves a "coverage issue", clearly within the jurisdiction of the Tax Court, the Court of Appeals was virtually "required" to dismiss the Government's petition for review for lack of jurisdiction. Indeed, a contrary decision would have been clearly erroneous and in conflict with the prior rulings of the Court, and it would have been necessary for the Court to ignore this Court's ruling in *Macauley* v. *Waterman*.

So far as petitioners' second argument is concerned, *i. e.*, that the decision of the Court of Appeals is inconsistent with prior decisions of the same court in other cases, we have already shown in Point III, *supra*, that there is in fact no such inconsistency between this and the prior decisions.

Petitioners' third argument, which is really a plea for a judicial amendment of the "finality clause" in the Renegotiation Act, likewise fails to sustain petitioners' demand that the judgment of the Court of Appeals be reversed. Indeed, it comes very close to being an admission that the judgment below was correct. But, even if this Court were to adopt as its own the rule of the District of Columbia Circuit, that decisions of the Tax Court may be reviewed directly in respect to "constitutional" and "jurisdictional" questions, it would still be necessary to affirm the judgment of the Court of Appeals, because the basic issue involved here is neither a "constitutional" nor a "jurisdictional" question. *Macauley* v. *Waterman* determined it is a "question of coverage," clearly within the jurisdiction of the Tax Court.

> circuit court of appeals of a decision of The Tax Court was not applied to the decision on a renegotiated case. This question was settled in conference. I think some of the conferees thought otherwise, but the statute is very specific, as I read it, that there is no appeal on a question of law from The Tax Court of the United States."

Congressman Lynch commented as follows (*Id.* at p. 183):

> "And it was the intention of the committee at that time that The Tax Court should be the final arbiter; should consider all the facts *de novo* and pass on the facts and on the law as an appeals court deciding upon the appeal that might be taken from what was up to that time apparently the final determination of the agency board; * * *"

Later he added the following (*Id.* at p. 185):

> "We gave you more than you really wanted when we permitted a hearing *de novo* in The Tax Court, which was to be, as I recall it, the final determination in order that these appeals might not drag out over the years."

Congressman Jenkins agreed by saying (*Id.* at p. 187):

> "Yes. We gave to the War Department, which is not a judicial agency, and we gave to the Navy Department, the right to go back and recast a contract and review it and renegotiate it. It was purely an administrative matter and rather than let it rest with them, and inasmuch as it had a tax phase, we decided that The Tax Court would have the last say on it."

It is important to note that, despite Mr. Alvord's urging, Congress did not see fit to provide for any direct review

For that reason, petitioners are obliged to propose further that this Court also hold that the term "jurisdictional question" must be deemed to include all "non-constitutional" questions, including "questions of coverage" such as the one involved herein. Thus, the only non-reviewable questions would be those pertaining directly to the monetary amount of the contractor's excessive profits and, of course, any "constitutional" questions. Obviously, such a decision would almost nullify the "finality clause" of the Renegotiation Act, contrary to the legislative intent of Congress as disclosed in the legislative history of the Renegotiation Act. (Point II, *supra.*)

We respectfully submit, therefore, that petitioners have failed to offer any sound legal reasons why the judgment of the Court of Appeals in this case should be reversed.

Finally, because this case does not involve any ruling by the Tax Court in respect to its own jurisdiction, it is unnecessary for this Court even to consider at this time whether the rule of the District of Columbia Circuit, which permits a limited direct review of Tax Court decisions in renegotiation cases, is a correct ruling. Nor is there any need to approve or disapprove the more rigid rule of the Ninth Circuit, which does not permit a direct appeal to the Court of Appeals on any question decided by the Tax Court. For the purposes of the present case, it is sufficient that the rule in both Circuits precludes a review of Tax Court determinations with respect to "questions of coverage."

beyond the Tax Court. It is plain that Congress in 1944, and again in 1945, considered the advisability of further appeal and decided against it.

When the 1943 bill reached the Senate side, the Senate Committee substituted the Court of Claims for the Tax Court, but made no other essential change in the provisions of Sec. 403(e). The finality clause remained as before. The report of the Finance Committee contains the following statement:

> "The jurisdiction of the court finally to determine the amount, if any, of excessive profits, is to be exclusive under the committee bill, as was the case with the jurisdiction of The Tax Court under the House bill, and that determination is not to be reviewed or redetermined by any court or agency." S. Rept. No. 627, 78 Cong., 1st Sess., p. 110.

In the course of the Senate debate, Senator Truman offered an amendment which proposed to strike the following language:

> "Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency",

and to insert in lieu thereof:

> "Such petition shall constitute the exclusive method of review of such order and upon the filing thereof such court shall have exclusive jurisdiction by order finally to determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor; *such determination shall be subject to appellate review as in the case of other decisions*

V.

THE JUDGMENT OF THE COURT OF APPEALS WAS CORRECT AND IT SHOULD BE AFFIRMED BY THIS COURT.

Respectfully submitted,

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> *of the court*, but shall not be reviewed or redetermined by any other court or agency; and no suit brought for the purpose of restraining a renegotiation or the enforcement thereof, or the withholding or recovery of any amounts pursuant thereto, or for the purpose of compelling any action in disregard of a renegotiation, shall be maintained in any court, nor shall any renegotiation be set aside or disregarded in any suit or action in any court. The Court of Claims shall not set aside the determination made in the order unless it first appears that one or more material facts stated pursuant to subsection (c)(1) as the basis therefor are wrong or that the determination is based on one or more errors of law. If the determination is set aside by the court, the court shall determine the amount of excessive profits." 90 Cong. Rec. 531.

It will be seen that this amendment, among other things, proposed review by this Court of the Court of Claims' determination, but even under this amendment any other form of appellate review was expressly prohibited. The amendment was rejected. 90 Cong. Rec. 535. Again Congress expressed its intent that there should be no direct appeal from the Court of Claims' decision. When the Tax Court was restored to the bill in conference, the finality clause remained as originally written. In fact, the finality clause did not change in any respect throughout the entire legislative process.

In sharp contrast, however, to this insistence of Congress that there be no appellate review beyond the Tax Court under the 1943 Act, was the action it took when it came to pass the 1948 Act. In this later Act it specifically provided that the Tax Court's "redetermination shall be subject to review to the extent and in the manner provided by subchapter B of Chapter 5 of the Internal Revenue Code".

Section 3(e), 62 Stat. 259, 50 U. S. C., App. 1193(e). This applied the appeal provisions already pertaining to tax cases (26 U. S. C. 1140-1146) to renegotiation cases in the Tax Court arising under the 1948 Act. It is important to note that when Congress wanted to provide for direct appeal from the Tax Court decision, it knew how to do so; it applied appellate provisions entirely absent from the 1943 Act.

Furthermore, when Congress came to pass the 1951 Act it pulled back and reverted to its earlier concept; it again restricted review of the administrative Board's decision solely to the Tax Court. It employed identically the same language it had used in the 1943 Act. Referring to this action in the course of the debate in the House on the 1951 Act, Mr. Curtis, of Nebraska, said (97 Cong. Rec. 595):

> I believe that the power vested in this bill is so great that there should be an appeal beyond the appeal provided to the Tax Court. Objection has been raised to that. We are told that it is an administrative matter; that it is a matter that calls for discretion to determine how much the Government should pay for a certain article. Nevertheless, I feel that we are on such dangerous ground in tampering with the right of contract that it should be safeguarded in every way and that anyone aggrieved should have access to the courts of the land. I regret that the bill does not so provide. My amendment for such appeals, as well as my amendment to place E. C. A. contracts under the renegotiation law, was rejected by the Committee.

So again, when Congress wanted to limit direct review to the Tax Court, it knew how to do so. Like in the 1943 Act, although a long list of Internal Revenue sections are adopted into the 1951 Renegotiation Act, Section 1141, pro-

viding for appeal from the Tax Court to the Courts of Appeals, is conspicuous by its absence.

From the foregoing, it is apparent that the legislative history supports the clear wording of the statute that the order of the Tax Court finally determining the amount, if any, of excessive profits "shall not be reviewed or redetermined by any court or agency", and, as this Court held in *Macauley* v. *Waterman,* the term "amount" was intended by Congress to include questions of coverage.

III.

THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH ANY DECISION OF THIS COURT OR WITH ANY OF ITS OWN PRIOR DECISIONS IN RESPECT TO DIRECT JUDICIAL REVIEW OF COVERAGE ISSUES.

This Court has on occasion discussed the question of whether renegotiation decisions of the Tax Court are subject to direct or collateral judicial review, but so far the Court has found it unnecessary to rule upon any such questions and they have always been expressly reserved for possible future determination. Nevertheless, in the course of these discussions, the Court has expressed views which we consider relevant to the questions presented in this proceeding. *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540 (1946); *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752 (1947); *Lichter* v. *United States,* 334 U. S. 742 (1948).

In each of those cases this Court held that under the provisions of the Renegotiation Act, as amended, the Tax Court has "exclusive jurisdiction, by order, to finally determine" all questions of fact and law presented to it by an aggrieved contractor under authority of Section 403(c)

of the Renegotiation Act, and, that Congress expressly intended that no other court should have jurisdiction to consider such questions, at least until they have been passed upon by the Tax Court in the exercise of its "exclusive jurisdiction" over such matters.

In *Macauley* v. *Waterman*, the Court was even more specific. After pointing out that the Act confers exclusive jurisdiction upon the Tax Court, by order, "to finally determine the amount, if any, of" a contractor's excessive profits, it held that "a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits"; therefore, that the Tax Court's exclusive jurisdiction extended to and included the power to redetermine all such "questions of coverage". The *Macauley* case is particularly relevant to the present case, because the basic question of coverage involved there was *identical* to the one presented here. Referring to Waterman's Red Sea charters, which were made under identical circumstances, this Court noted that the legislative history of the Renegotiation Act shows that Congress intended the Tax Court to have "exclusive jurisdiction" to decide all questions of law and fact, which latter, the Court said, "*included the issue raised here of whether the contracts in question are subject to the Act.*"

By holding that the Tax Court had such exclusive jurisdiction "to finally determine" the same question of coverage as the one which the Tax Court determined adversely to the Government in this case, this Court clearly indicated that it considered questions of coverage to be on a parity with questions of monetary amount, so far as the finality provisions of the Act are concerned. If so, it would reasonably follow that the Act's prohibition against direct judicial review, which is specifically applicable to final determinations of the Tax Court in respect to the "amount"

of a contractor's excessive profits under a contract, would be equally applicable to determinations of the Tax Court as to whether the contract is a renegotiable contract. Moreover, in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, we find an extended discussion of the degree of finality which this Court thought Congress intended to accord decisions of the Tax Court in respect to renegotiation cases. The Court again found it unnecessary to decide whether an aggrieved contractor has any right to a judicial review, directly or collaterally, of a Tax Court decision, but in an opinion by Mr. Justice Rutledge the Court discussed the legislative history of the act and said (pp. 767-770):

"The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision.

"There can be no doubt whatever, in view of the legislative history, that Congress had each of these ends in

view when it provided for the Tax Court proceedings, as well as for action by the Board prior to that stage. Indeed the Board was created in large part to bring under a single aegis the last stage of informal renegotiation before the Tax Court action, in order thus to secure as nearly as possible uniform policy and administration of renegotiation problems. This policy was followed and reinforced in the provision for Tax Court redetermination. And that procedure was chosen deliberately in preference to judicial review in the Court of Claims or elsewhere, primarily because of the Tax Court's expertness in fiscal matters analogous to those arising in connection with renegotiation problems, as well as its essentially judicial procedures and experience.

"It is equally clear that Congress intended to endow the Tax Court's decisions with a very large degree of finality, as appears from the very terms of §403(c)(1), from the whole structure of the Act, and from the legislative history. The express command of §403(c)(1) is not simply that the Tax Court shall have "exclusive jurisdiction, by order, to finally determine" the amount of excessive profits, if any. It is also that the determination "shall not be reviewed or redetermined by any court or agency." This is buttressed by the prohibition that filing the petition shall not operate to stay execution of the Board's order under §403(c)(2). And not irrelevant to the statute's general policy of finality are the provisions making the Board's determinations final, if the petition for Tax Court redetermination is not filed in the specified time, and those of the Secretary or his delegates final if similar action is not taken to secure redetermination by the Board. §403(c)(1).

"True, the statute expressly confers rights to follow through the various stages of the procedure to the end of the Tax Court phase. Nevertheless its entire structure indicates the congressional purpose to have matters of renegotiation promptly and expeditiously settled; and to accomplish this as far as possible both by informal negotia-

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IN THE

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OCTOBER TERM, 1954

No. 263

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v.

CALIFORNIA EASTERN LINE, INC.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE ON BEHALF OF ESTATE OF ROBERT I. GALE, DECEASED, ROBERT I. GALE, JR., EXECUTOR, GUY W. WATERS AND EDGAR H. VOGEL, AND BRIEF AS AMICI CURIAE.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The Estate of Robert I. Gale, Deceased, Robert I. Gale, Jr., Executor, Guy W. Waters and Edgar H. Vogel, (hereinafter referred to as the "Applicants") hereby respectfully move for leave to file a brief as *amici curiae* in this case. The consent of the counsel for the Petitioners has been obtained. The consent of the counsel for the Respondent was requested but refused.

The interest of the Applicants in this case arises from the fact that they are petitioners for review of a decision of the Tax Court, 19 T.C. 1107, under the Renegotiation Act of 1942, as amended, in a case now pending in the United States Court of Appeals for the District of Columbia Circuit. *Estate of Robert I. Gale, deceased, Robert I. Gale, Jr., Executor, Guy W. Waters and Edgar H. Vogel* v. *United States of America,* No. 11906, C.A.D.C.

The *Gale* case, like the case at bar, raises the issue of whether a litigant is entitled to judicial review of a Tax Court decision that a particular contract is, or is not, subject to the Renegotiation Act. Specifically, in the *Gale* case the question is whether an agreement for the cancellation on December 30, 1943 of a certain long-term contract, entered into in 1934 and continuing in effect thereafter, for the management and direction of the sales of a division of a steel company, is a subcontract within the definition contained in § 403 (a)(5)(B) of the Renegotiation Act and is hence subject to the Act.

When the petition for review in the *Gale* case was filed in the District of Columbia Court of Appeals it appeared certain that under 26 U.S.C. 1141 (a) and the decisions of the Court of Appeals in *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134, and *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, that Court had jurisdiction to review the decision of the Tax Court. However, in oral argument, questions were raised by the Court as to whether its decisions in the case at bar and *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, precluded such review.

The *Gale* case was argued in the United States Court of Appeals for the District of Columbia Circuit on April 14, 1954. Two other cases arising under the Renegotiation Act were argued before that Court during the month of May 1954. *Hanlon-Waters, Inc.* v. *United States*, No. 11934, C.A.D.C.; *Jacob Lichter, et al.* v. *United States of America, et al.*, No. 11925, C.A.D.C. Since none of these cases has yet been decided, it appears that the Court of Appeals is withholding decision pending the decision of this Court in the case at bar. While the *Gale* case presents certain factual and legal aspects not present in the case at bar, it is evident that the decision of this Court in the latter case may determine whether the Court of Appeals will review the decision of the Tax Court in the *Gale* case.

As the Petition for Writ of Certiorari and the brief of the Government reveal, because of the background from which the case at bar has evolved, the position which the

Government takes in this case is a special one. For this reason, the Applicants believe that they may assist this Court by more specifically setting forth the position of a litigant who seeks judicial review of a decision of the Tax Court concerning the status under the Renegotiation Act of a particular contract.

A petition for review filed by a contractor with the Government may raise constitutional and other questions not present in connection with such a petition filed by the Government itself. However, it is the contention of the Applicants that, aside from and in addition to these considerations, the language and legislative history of the Renegotiation Act impel the conclusion that a litigant is entitled to judicial review of a decision of the Tax Court that a particular contract is, or is not, subject to the Renegotiation Act, and that such review is available to the Government, as well as to a contractor. The Applicants, therefore, believe that a brief filed by them as *amici curiae* may assist this Court in determining the basic issue presented in the case at bar.

Respectfully submitted,

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BRIEF OF ESTATE OF ROBERT I. GALE, DECEASED, ROBERT I. GALE, JR., EXECUTOR, GUY W. WATERS AND EDGAR H. VOGEL, AS AMICI CURIAE.

STATUTES INVOLVED.

The pertinent provisions of the Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U. S. C. App. 1191), and of Section 7482 of the Internal Revenue Code of 1954 (P. L. 591, 83d Cong., 2d Sess., Title 26 U. S. C.) are set forth in Appendix A, *infra,* pp. 27-30.

INTEREST OF THE AMICI CURIAE.

The *amici curiae* herein are petitioners for review of a decision of the Tax Court, 19 T. C. 1107, under the Renegotiation Act [1] in a case now pending in the United States

[1] When used herein, the term "Renegotiation Act" refers to § 403 of the Act of April 28, 1942, C. 247, Title IV, 56 Stat. 245, as amended, 50 U. S. C. App. 1191.

Court of Appeals for the District of Columbia Circuit, No. 11906, entitled "*Estate of Robert I. Gale, deceased, Robert I. Gale, Jr., Executor, Guy W. Waters and Edgar H. Vogel* v. *United States of America*".

The *Gale* case, like the case at bar, raises the issue of whether a litigant is entitled to judicial review of a Tax Court decision holding that a particular contract is, or is not, subject to the Renegotiation Act. Specifically, in the *Gale* case the question is whether an agreement for the cancellation on December 30, 1943 of a certain long-term contract, entered into in 1934 and continuing in effect thereafter, for the management and direction of the sales of a division of Crucible Steel Company, is a subcontract within the definition contained in § 403 (a)(5)(B) of the Renegotiation Act (50 U. S. C. App. 1191 (a)(5)(B)) and is hence subject to the Renegotiation Act.[2]

When the petition for review in the *Gale* case was filed in the District of Columbia Court of Appeals it appeared certain that under 26 U. S. C. 1141 (a) and the decisions of the Court of Appeals in *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134, and *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, that Court had jurisdiction to review the decision of the Tax Court. However, in oral argument, questions were raised by the Court as to whether its decisions in the case at bar and *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, precluded such review.

The *Gale* case was argued on April 14, 1954 before Edgerton, Miller and Bazelon, JJ. Two other cases arising under the Renegotiation Act were argued before the Court on May 12, 1954. *Hanlon-Waters, Inc.* v. *United States*, C. A. D. C. No. 11934 (Miller, Bazelon and Fahy, JJ.); *Jacob Lichter, et al.* v. *United States of America, et al.*, C. A. D. C. No. 11925 (Miller, Bazelon and Fahy, JJ.).

---

[2] Since the *amici curiae* had no other renegotiable contracts or subcontracts, unless their contract was a subcontract within the definition contained in § 403 (a)(5)(B), the Tax Court had no jurisdiction to determine that the *amici curiae* had received excessive profits.

See Petition for Writ of Certiorari, p. 11. Since none of these cases has yet been decided, it appears that the Court of Appeals is withholding decision pending the decision of this Court in the case at bar. While *Gale* presents certain factual and legal aspects not present in the case at bar, it is evident that the decision of this Court in the latter case may determine whether the Court of Appeals will review the decision of the Tax Court in the *Gale* case.

SUMMARY OF ARGUMENT.

I.

Analysis of the language and legislative history of the Renegotiation Act impels the conclusion that the Court of Appeals for the District of Columbia Circuit has jurisdiction to review Tax Court decisions under the Act. Only the Tax Court's determination of the *amount of excessive profits* has been withdrawn from review.

Section 403 (e)(1) of the Renegotiation Act does not, by its terms, prohibit judicial review of a decision of the Tax Court or its "order". Only review of the "determination" of "the amount, if any," of excessive profits is prohibited. The significance of the language in § 403 (e)(1) is emphasized by contrast with § 403 (c)(1) and § 403 (c)(4). The first of these sections provides, in substance, that when the Board issues a unilateral order and the contractor fails to exhaust his administrative remedy by filing a petition with the Tax Court, the "order" of the Board, not merely its "determination" of "the amount, if any, of excessive profits", is final and conclusive and shall not be subject to review or redetermination. § 403 (c)(4) provides that when the Board and a contractor enter into an agreement, in the absence of "a showing of fraud or malfeasance or a willful misrepresentation of a material fact, . . . such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding." Thus the Congress attached different consequences to the diverse

steps which may be taken in the renegotiation process. Under § 403 (c)(1) and § 403 (c)(4), certain deliberate action or inaction in the course of the administrative process will result in waiver of all rights to review. But the administrative process ends with the Tax Court's decision and order, and nothing in the language of § 403(c)(1) deprives an aggrieved party of judicial review of the Tax Court's decision if the question presented is whether the Court, in making a determination of *amount*, or in refusing to make a determination, acted within the scope of the Renegotiation Act.

While the original Renegotiation Act passed in 1942 did not by its terms provide for judicial review, the Congress and the renegotiating agencies believed that such review was available to contractors. Hearings before the House Committee on Naval Affairs pursuant to H. R. Res. No. 30, 78th Cong., 1st Sess. (1943), Vol. 2, pp. 433, 506-509; Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015, 78th Cong., 1st Sess. (1943), pp. 31-32, 71-72, 819, 821, 842, 882. § 403 (c)(1), which was added to the Act in 1944, was drafted in response to requests of contractors for additional safeguards, including specific provision for judicial review. Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015, 78th Cong., 1st Sess. (1943), pp. 266, 270, 487-489, 506-509, 518-519, 524-525, 527, 531-532, 551, 646, 673, 842-846, 851, 882, 959, 974-975, 982-983, 1039, 1041; Hearings before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. (1943), pp. 386, 409, 990, 1015-1016. The evidence indicates that in drafting § 403 (c)(1) the Congress intended to make provision for judicial review, and also to provide, at some stage in the renegotiation process, a redetermination of excessive profits in a *de novo* proceeding of record. See H. R. Rep. No. 733, 78th Cong., 1st Sess. (1943), p. 60; H. R. Rep. No. 871, 78th Cong., 1st Sess. (1943), pp. 76-77. Because the distinction between these objectives was sometimes obscured in the hearings and debates, the degree of finality which the Con-

gress intended to attach to Tax Court decisions under the Act is not immediately evident from the legislative history. However, analysis reveals certain significant facts, discussed in some detail in this brief, which impel the conclusion that the Congress intended to prohibit judicial review of the Tax Court's factual determinations of the *amount* of excessive profits, either upon petition for review or in collateral proceedings, but that it did not intend otherwise to limit the review of Tax Court decisions available under § 1141 (now § 7482) of the Internal Revenue Code.

The Renegotiation Board officials who sponsored the 1951 Renegotiation Act believed that review was available under the World War II Act, and that the incorporation in the 1951 Act of language (50 U. S. C. App. 1218) similar to that in § 403 (e)(1) would not preclude review under the latter Act. Hearings before the House Committee on Ways and Means on H. R. 9246, 81st Cong., 2nd Sess. (1950), p. 18. The 1951 Act contains internal evidence that the Congress believed that the § 403 (e)(1) language did not preclude judicial review. 50 U. S. C. App. 1216 (a)(6), 1216 (a)(8), 1218.

II.

An aggrieved contractor, who asserts that the Tax Court, in making a determination of excessive profits, exceeded its authority under the Renegotiation Act, is entitled, under the Constitution and decisions of this Court, to judicial review.

A construction of § 403 (e)(1) which would preclude all judicial review would, in the case of an aggrieved contractor, violate the Constitution or, at least, present a serious constitutional question and should be avoided. See *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 491-492.

The determination of the statutory basis of an administrative agency's action is a judicial function. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *Stark* v. *Wickard*, 321 U. S. 288, 309-310; *Federal Communications*

Commission v. *Pottsville Broadcasting Company*, 309 U. S. 134, 144-145.

When a contractor believes that the Tax Court, in determining the amount of excessive profits, has exceeded the statutory limits of the Renegotiation Act, the due process clause of the Fifth Amendment immediately becomes relevant. In such a situation the Courts must have power in a proper proceeding to grant relief. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. See also *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619-620; *International Railway Co.* v. *Davidson*, 257 U. S. 506; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337; *Central of Georgia R. Co.* v. *Wright*, 207 U. S. 127.

In upholding the constitutionality of other World War II legislation, this Court has uniformly found that ultimate judicial review was specifically provided or otherwise available. *Estep* v. *United States*, 327 U. S. 114; *Bowles* v. *Willingham*, 321 U. S. 503, 521; *Yakus* v. *United States*, 321 U. S. 414, 442, 444. Cf. *Cities Service Company* v. *McGrath*, 342 U. S. 330. The denial of judicial review under the Renegotiation Act would appear to be without precedent in analogous cases decided by this Court.

The District of Columbia Court of Appeals is a proper forum for the judicial review of Tax Court decisions under the Renegotiation Act. § 7482 (formerly § 1141) of the Internal Revenue Code. See also § 3 (e) of the Renegotiation Act of 1948, 50 U. S. C. App. 1193 (e).

That Court has held that it has jurisdiction to review Tax Court decisions under the Renegotiation Act on constitutional and jurisdictional grounds. *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134; *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U. S. 912; *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, certiorari denied, 343 U. S. 967. Its refusal to review in the case at bar is based upon an artificial distinction between jurisdiction and "coverage". The question whether

a particular contract is a contract or subcontract as defined in the Renegotiation Act is jurisdictional in the most fundamental sense and cannot be avoided merely by terminology.

III.

The Petitioner is entitled to review in the United States Court of Appeals for the District of Columbia Circuit of a decision of the Tax Court that a specific contract is not a contract or subcontract defined in the Renegotiation Act. As demonstrated herein, such a decision presents a reviewable question, and the position of the Petitioner is analogous to that of the Commissioner of Internal Revenue, who may invoke the jurisdiction of the Courts of Appeals under § 7482 of the Internal Revenue Code to review decisions of the Tax Court under the revenue laws. See *Commissioner of Internal Revenue* v. *Liberty Bank & Trust Co.*, 59 F. 2d 320 (C. C. A. 6). The nature and purpose of the Renegotiation Act evidence the intent of Congress that review may be invoked by a renegotiating agency, as well as a contractor. See *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 431; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279.

ARGUMENT.

I.

Analysis of the Language and Legislative History of the Renegotiation Act Impels the Conclusion That the Court of Appeals for the District of Columbia Circuit Has Jurisdiction to Review Tax Court Decisions Under the Act. Only the Tax Court's Determination of the Amount of Excessive Profits Has Been Withdrawn from Review.

A. The Text of the Renegotiation Act, as Amended.

Section 403 (e)(1) of the Renegotiation Act (50 U. S. C. App. 1191 (e) (1)) reads in part as follows:

> "Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting

> Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1) [of this section], file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing *such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency.* The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo." (Emphasis added).

It is of critical importance that this section does not by its terms interdict review of the entire decision of the Tax Court, as expressed in its "order." The literal prohibition is much more limited. It is stated that "such determination," the determination of "the amount, if any, of such excessive profits . . . shall not be reviewed or redetermined by any court or agency." The language "leaves untouched, by direct reference or otherwise, the remaining content of § 1141 (a) [now § 7482 (a)] of the Internal Revenue Code." *U. S. Electrical Motors, Inc.* v. *Jones,* 153 F. 2d 134, 136 (C. A. D. C.).

The significance of the choice of language in § 403 (e)(1) is emphasized by contrast with other sections of the Act. § 403 (c)(1) (50 U. S. C. App. 1191 (c)(1)) provides in part:

> "If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the

time limit prescribed in subsection (e)(1) [of this section], *such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency.*" (Emphasis added).

Thus when a contractor or subcontractor fails to exhaust his administrative remedy by filing a petition with the Tax Court, the "order" of the Board, not merely its determination of "the amount, if any, of excessive profits," is "final and conclusive and shall not be subject to review or redetermination by any court or other agency."

Again, § 403 (c)(4) (50 U. S. C. App. 1191 (c)(4)) reads as follows:

> "For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its terms; and *except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact,* (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) *such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.*" (Emphasis added).

Hence, when a contractor or subcontractor chooses to enter into an agreement with the Board, in the absence of "a showing of fraud or malfeasance or a willful misrepresentation of a material fact, . . . such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding."

The Congress attached varying consequences to the diverse steps which may be taken in the renegotiation process. Under § 403 (c)(1) and 403 (c)(4), a contractor (and,

in the case of an agreement, the Board) may by deliberate action or inaction in the course of the administrative process waive all rights of review. But the pertinent portion of § 403 (e)(1) presents an entirely different situation. There the administrative process has ended with the decision and order of the Tax Court. While § 403 (e)(1) says that the Tax Court's *determination* of the *amount*, if any, of excessive profits shall not be reviewed or redetermined, this presupposes a determination in a valid *order* of the Tax Court within the ambit of the Renegotiation Act with respect to profits derived from contracts or subcontracts defined in the Act.[3] Nothing in the language of § 403 (e)(1) purports to deprive an aggrieved party of judicial review of the Tax Court's decision afforded by § 7482 (formerly § 1141) of the Internal Revenue Code if the question presented is whether the Tax Court, in making a determination of the *amount* of excessive profits, or in refusing to make a determination, acted within the ambit of the Renegotiation Act.

B. The Legislative Background.

The genesis of the Renegotiation Act was a one-section, one-sentence amendment to H. R. 6868, 77th Congress, introduced in the House on March 28, 1942 by Mr. Case of South Dakota. 88 Cong. Rec. 3139 (1942). The bill was passed by the House with the Case amendment included. *Id.*, 3140. In the Senate, on April 7, 1942, Senator McKellar offered a more elaborate substitute for the Case amendment. *Id.*, 3387. Included in Senator McKellar's amendment was a sentence reading as follows:

> "No suit or action may be maintained in any court to recover from the United States any amount withheld from a contractor pursuant to the provisions of this subsection."

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[3] § 403 (h) (50 U. S. C. App. 1191 (h)) specifically states that the Act "shall apply *only with respect to profits derived from contracts with the Departments and subcontracts* which [profits] are determined under regulations prescribed by the Board to be reasonably allocable to performance prior to the close of the termination date." (Emphasis added).

This sentence provoked vigorous objection (*Id.*, 3402-3403) and it was amended by the addition of the words "After the expiration of this act," as a preface. *Id.*, 3403. H. R. 6868 was passed by the Senate with the McKellar amendment included. *Id.*, 3410. However, in conference the section dealing with renegotiation was rewritten and the quoted sentence was omitted in its entirety. *Id.*, 3649.

Subsequently, in debate Senator McKellar specifically stated that the rewritten section left no doubt as to the right of a contractor to seek judicial relief. *Id.*, 3652. After the enactment of H. R. 6868 with the renegotiation section included, the right of a contractor to judicial review was emphasized to Congress by representatives of the War Department and the Navy Department responsible for the administration of the Act.[4] Mr. W. John Kenney, then a member and counsel of the Navy Price Adjustment Board, submitted an extensive memorandum demonstrating that, without question, contractors could seek judicial review.[5]

However, in 1943 members of Congress and contractors advocated a specific enunciation of the right to judicial review.[6] Also, it was urged that the failure of the Price

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[4] Hearings before the House Committee on Naval Affairs pursuant to H. R. Res. No. 30, 78th Cong., 1st Sess. (1943), Vol. 2, pp. 433, 506-509; Hearings before the Subcommittee of the House Committee on Appropriations on Mil. Est. App. Bill for 1944, 78th Cong., 1st Sess. (1943), p. 514; Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015, 78th Cong., 1st Sess. (1943), pp. 31-32, 71-72, 819, 821, 842, 882; Hearings before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. (1943), pp. 990, 1016, 1037, 1070.

[5] Hearings before the House Committee on Naval Affairs pursuant to H. R. Res. No. 30, 78th Cong., 1st Sess. (1943), Vol. 2, pp. 506, 1039-1043.

[6] Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015, 78th Cong., 1st Sess. (1943), pp. 266, 270, 487-489, 506-509, 518-519, 524-525, 527, 531-532, 551, 646, 673, 761 (contra), 842-846, 851, 882, 959, 974-975, 982-983, 1039, 1041; Hearings before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. (1943), pp. 386, 409, 990, 1015-1016.

Adjustment Boards to maintain records of their proceedings made it well-nigh impossible for a contractor to demonstrate that a determination of a Board lacked the necessary evidentiary support and hence largely negatived the value of judicial review.[7]

To overcome these latter objections to the Boards' procedures it was considered necessary to amend the law, either to require the renegotiating agencies to develop a record comparable to that maintained by other administrative bodies, or to provide a *de novo* hearing and record at some subsequent stage of the renegotiation process. There was Congressional sentiment for the first of the alternative correctives, but witnesses for the defense agencies strongly urged the latter. 90 Cong. Rec. 532, 534-535 (1944). They apparently believed that the development of a record in each of the thousands of cases would be administratively impractical and that since nearly all cases were settled by agreement, such records were unnecessary. *Ibid.*

The degree of finality which the Congress intended to attach to Tax Court decisions under the Renegotiation Act is not immediately evident from the lengthy legislative history of the 1944 amendment which added § 403 (e)(1). This is true because in the hearings and debates the distinction between the two objectives, provision for judicial review, on the one hand, and provision for a redetermination in a *de novo* proceeding of record, on the other, was sometimes obscured.

However, upon analysis certain significant facts emerge from the legislative history which impel the conclusion that

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See also H. R. Rep. No. 733, 78th Cong., 1st Sess. (1943), Report of the Committee on Naval Affairs, pursuant to H. R. Res. No. 30, p. 60, recommending that the Act "be amended so as to make specific provisions for judicial review of unilateral determinations".

[7] Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015, 78th Cong., 1st Sess. (1943), pp. 506-509, 518-519, 531-532, 551, 825-826, 837-839, 842-846, 896-897, 974-975, 982-983.

§ 403 (e)(1) was intended to give finality only to the Tax Court's factual determinations[8] of the *amount of excessive profits* and not otherwise to limit judicial review. Among the most pertinent facts are these:

1. The primary purpose of § 403 (e)(1) was to provide to contractors additional safeguards against possible arbitrary action by the renegotiating agencies.[9] Since judicial review was believed to be already available under the original Renegotiation Act,[10] an intent to cut off all judicial review would have been inconsistent with this primary purpose. And the Congress evidenced no intent to constitute the Tax Court a constitutional or legislative court.

2. The legislative history discloses no compelling expression of Congressional intent to cut off judicial review. No such expression is found in the Committee reports, which merely paraphrase the statutory language.[11] There were isolated statements in the Senate hearings indicating that under the House version of § 403 (e)(1), which was subsequently enacted, a contractor's final resort would be in the Tax Court.[12] However the casual nature of these statements is evidenced by the comment of Judge Patterson, then Under Secretary of War, at one point in the Senate

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[8] For an analysis of the method employed in making such factual determinations, see Appendix B, *infra*, pp. 31-32.

[9] See note 6, *supra*.

[10] See note 4, *supra*.

[11] H. R. Rep. No. 871, 78th Cong., 1st Sess. (1943), pp. 76-77; Sen. Rep. No. 627, 78th Cong., 1st Sess. (1943), p. 109; H. R. Rep. No. 1079, 78th Cong., 2d Sess. (1944), p. 83.

[12] Hearings before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. (1943), pp. 999, 1015, 1033. One such statement is found in a staff analysis: "The decisions of the Tax Court are not subject to further review." Whether "decisions" is meant to include all questions is not clear from the context. *Data on Renegotiation of Contracts*, Senate Committee on Finance (December 9, 1943), p. 7.

Finance Committee hearings, that "the final resort for *court review* is to the Tax *Board*".[13] (Emphasis added).

3. There appears to have been no considered opinion in the Congress that it had the power to prohibit judicial review of Tax Court decisions, or that determinations of the Tax Court without judicial review would meet the constitutional requirement of due process. In the Finance Committee hearings there is positive evidence to the contrary.[14] Mr. Francis M. Shea, then Assistant Attorney General, in a comprehensive statement on the pending House bill, said in part:

> ". . . this bill is not drafted to be effective as an absolute prohibition of judicial review, if the power so to prohibit did exist in the Congress. I am fearful that it will merely substitute injunction suits for the more orderly process of an adequate remedy at law. In short, assuming the right of the Congress to impose renegotiation orders, I doubt that it can prevent resort to some judicial tribunal on complaint of the contractor that the way renegotiation was done was arbitrary and capricious. I doubt that the legislation is drafted effectively to prevent resort to the courts by injunction suits and other means to review that issue. Provision for appeal to The Tax Court very probably does not constitute an adequate remedy at law which satisfies whatever right there may be to judicial process. The Tax Court is a part of the executive branch of the Government. . . ." [15]

The point made by Mr. Shea was highlighted in the following excerpt from a discourse between Mr. Shea and Senator Clark:

> SENATOR CLARK: Where the administrative agency is the final determining agency, it doesn't make any difference how many there are; it does not mean that he has had his day in court.

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[13] Hearings before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. (1943), p. 1015.

[14] *Id.*, 1033, 1036-1038, 1041-1042.

[15] *Id.*, 1037.

MR. SHEA: That is right.

SENATOR CLARK: The essence of a review is a review in court, not by any other administrative agency?

MR. SHEA: I think that is really the case.[16]

4. Mr. Disney, who was Chairman of the Subcommittee on Renegotiation of the House Ways and Means Committee, stated that the Committee's selection of the Tax Court as the agency for redetermination was, in part, because "a forum had to be chosen upon which Congress could impose the duty of deciding the nonjudicial question as to the amount of excessive profits". 89 Cong. Rec. 9929 (1943). Other remarks by Mr. Disney and also by Mr. Jenkins, who was a member of the Committee, appear to anticipate ultimate judicial review. *Id.*, 9930, 9934-9935. The Senate Finance Committee, which had been cautioned by Mr. Shea of the constitutional problems which would arise if the statute were construed to prevent ultimate resort to the judicial process, apparently felt that since a judicial remedy would be required at some stage, responsibility for redetermination could appropriately be placed in the Court of Claims. The Senate debate reveals a positive intent to provide contractors with "a day in court", in the judicial, as distinguished from the Tax Court, sense.[17] 90 Cong.

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[16] *Id.*, 1042.

[17] Senator Truman, in introducing an amendment which would have given the Court of Claims jurisdiction to review, rather than to redetermine in a proceeding *de novo*, said that renegotiation "is, by nature, an administrative function". He said that the "Court of Claims is a real court whose decisions are subject to review on certiorari by the Supreme Court in the same way that decisions of the courts of appeals, for example, are reviewed." Thus he felt that redetermination was unnecessary and inappropriate in the Court of Claims. By contrast, he cited *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U. S. 716, and emphasized that the Tax Court was merely "an administrative tribunal". The change of its name "did not affect its jurisdiction, powers, or status." Thus "the House bill did not actually give the contractor his day in court". 90 Cong. Rec. 531 (1944). In the debate, Senator Clark, who also desired to give the contractor a day in court, pointed out that unless the Board were required to keep a record of its proceedings there would be no adequate basis for review, as distinguished from redetermination, in the Court of Claims. *Id.*, 532.

Rec. 531-535 (1944). However, since Mr. Shea had advised the Senate Finance Committee that the House bill was not drafted to be effective as an absolute prohibition of judicial review, it is reasonable to conclude that the subsequent concurrence of the Senate conferees and the Senate itself in the House bill was premised upon the understanding that judicial review, except as to the *amount* of excessive profits, would be available to the contractor after decision by the Tax Court.

In summary, the fair deduction from the legislative history of the Renegotiation Act is that the Congress intended in § 403 (e)(1) to prohibit judicial review of the Tax Court's factual determinations [18] of the *amount of excessive profits*, either in the Courts of Appeals or in collateral actions in the District Courts or the Court of Claims, but that it did not intend otherwise to limit the review available under § 1141 (now § 7482) of the Internal Revenue Code.

C. Subsequent Related Legislation.

The Renegotiation Act of 1948 (62 Stat. 258, 259-261; 50 U. S. C. App. 1193), the history of which is very brief, was originally limited in application to funds expended under certain specific appropriations for the construction of aircraft and related equipment and certain Corps of Engineer

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[18] During the years between the passage of the Revenue Act of 1926 (44 Stat. 9) and the decision in *Dobson* v. *Commissioner of Internal Revenue*, 320 U. S. 489, on December 20, 1943 (while the pertinent amendment of the Renegotiation Act was pending in the Congress), because of the want of a certain standard for distinguishing "questions of law" from "questions of fact", there had not been a consistent and uniform compliance with the Congressional limitation upon judicial review of decisions of the Board of Tax Appeals (renamed the Tax Court). The *Dobson* decision reaffirmed the statutory limit of judicial review. It is not inappropriate to conclude that the Congressional direction in the Renegotiation Act resulted in part from the lack of uniformity in previous judicial decisions concerning the finality of Tax Court decisions, and that the Congress intended to accord to decisions of the Tax Court in renegotiation cases essentially the same degree of finality which it had by previous legislation given to decisions of the Tax Court in tax cases.

activities. § 3 (e) of the 1948 Act (50 U. S. C. App. 1193 (e)) reads as follows:

> "Agreements or orders determining excessive profits shall be final and conclusive in accordance with their terms and except upon a showing of fraud or malfeasance or willful misrepresentation of a material fact shall not be annulled, modified, reopened, or disregarded, except that in the case of orders determining excessive profits the amount of the excessive profits, if any, may be redetermined by the Tax Court of the United States in the manner prescribed in subsection (e)(1) of the Renegotiation Act of February 25, 1944, as amended, except that such redetermination shall be subject to review to the extent and in the manner provided by subchapter B of chapter 5 of the Internal Revenue Code [26 U. S. C. 1140-1146]." [19]

The Act was approved on May 21, 1948. At that time, however, there was pending in the Congress H. R. 3214 which was enacted on June 25, 1948, revising and codifying Title 28 of the U. S. Code. Section 36 of this latter Act (62 Stat. 869), amended Section 1141(a) of the Internal Revenue Code to provide that the Courts of Appeals shall have jurisdiction to review the decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Thus, when the two Acts are read in conjunction, it appears evident that the scope of review under the Renegotiation Act of 1948 was more extensive than that available either under the earlier Renegotiation Act, or under the Internal Revenue Code prior to 1948. However, since the Renegotiation Act of 1948 was a peacetime measure with

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[19] This section makes clear that the Congress was not troubled by the question of venue raised by the Ninth Circuit in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560. Whatever question might exist under Section 1141 (b)(1) (now Section 7482 (b)(1)) of the Internal Revenue Code with respect to venue in the circuits other than that for the District of Columbia, there appears to be no doubt that venue lies in the District of Columbia Circuit.

limited application, there were obvious reasons for specific provision for more extensive review under that Act.[20]

The Renegotiation Act of 1951 (65 Stat. 7, 50 U. S. C. App. 1211-1233) was designed to meet the exigencies arising from the outbreak of war in Korea. Its framework was essentially the same as that of the World War II Renegotiation Act. § 108 of the 1951 Act (50 U. S. C. App. 1218), like § 403 (e)(1) of the earlier Act, provided that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." In the hearings, representatives of the American Institute of Accountants and certain business and trade associations recommended an amendment to incorporate a specific review provision.[21] Also, in the debates two members of Congress expressed their preference for such an amendment. 97 Cong. Rec. 586, 594 (1951). However, Renegotiation Board officials who were sponsoring the legislation believed that appeal from decisions of the Tax Court was available under the original Renegotiation Act and that therefore appeal would be available under the 1951 Act, which incorporated the language of the earlier Act. This fact is illustrated by the following colloquy in the hearings before the House Ways and Means Committee between Representatives Curtis and Camp, Mr. Frank L. Roberts, then Chairman of

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[20] There was apprehension on the part of Defense Department officials and Senate Appropriations Committee members that contractors in certain industries, which had ample civilian markets, might not seek government contracts subject to renegotiation, and the extension of the scope of review was probably made to reassure these contractors. See Hearings before the Subcommittee of the Senate Committee on Appropriations, on H. R. 6226, 80th Cong., 2nd Sess. (1948), pp. 132-133.

[21] Hearings before the House Committee on Ways and Means, on H. R. 9246, 81st Cong., 2nd Sess. (1950), p. 226; and Hearings before the Senate Committee on Finance, on H. R. 1724, 82nd Cong., 1st Sess. (1951), pp. 72, 78, 88 and 110.

the Military Renegotiation Policy and Review Board, and now a member of the Renegotiation Board, and Mr. Barron K. Grier, counsel for the Military Renegotiation Policy and Review Board:

> MR. CURTIS: Under the old law you did have the right to get in the court on a writ of certiorari. You did not have many cases appealed, did you?
>
> MR. ROBERTS: Under the last act, the Tax Court was designated as the review body. A few cases went to the Tax Court. They did have the right to appeal from the Tax Court on a writ of certiorari.
>
> MR. GRIER: There was no provision in the 1943 act for going beyond the Tax Court. I think some of them did go to the Circuit Court and on to the Supreme Court on a writ of certiorari.
>
> MR. CURTIS: Yes. In this bill you have foreclosed that?
>
> MR. GRIER: No, sir; this is exactly the same. They can go to the Tax Court. There is no further provision in the bill for going into any other court.
>
> MR. CURTIS: It is exactly as the old law?
>
> MR. ROBERTS: Yes.
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> MR. CAMP: Mr. Grier, is it not a fact that there is a general statute which permits you to appeal from a decision of the Tax Court?
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> MR. GRIER: That is my understanding.
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> MR. CAMP: They can go in from the renegotiation board to the Tax Court. Then if they want to go any further, they have the right under the general law to appeal from the decision of the Tax Court. Is that right?
>
> MR. GRIER: I believe that is correct.
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> MR. CURTIS: That is what you intend to do, at any rate—not take away any rights they have under the general law?
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> MR. GRIER: That is correct.[22]

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[22] Hearings before the House Committee on Ways and Means, on H. R. 9246, 81st Cong., 2nd Sess. (1950), p. 18. By 1951 the District of Columbia Court of Appeals had several times determined that it had jurisdiction to review decisions of the Tax Court under the World War II Renegotiation Act on jurisdictional and constitutional questions. *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134; *Blanchard Machine Company* v. *Reconstruction Finance*

The Renegotiation Act of 1951 contains internal evidence that the Congress did not intend that § 108 preclude all review of Tax Court redeterminations. § 106(a)(6) (50 U. S. C. App. 1216 (a)(6)), which provides for the exemption of contracts which the Board determines do not have a direct and immediate connection with the national defense, reads in pertinent part as follows:

> "Notwithstanding section 108 of this title, regulations prescribed by the Board under this paragraph, and any determination of the Board that a contract is or is not exempt under this paragraph, shall not be reviewed or redetermined by the Tax Court *or by any other court or agency*". (Emphasis added).

§ 106 (a)(8) of the Renegotiation Act of 1951, which was added to the Act by § 5 of Public Law 764, 83d Cong., 2nd Sess., approved September 1, 1954, and which provides for the exemption of contracts or subcontracts for the making or furnishing of standard commercial articles, contains the following significant language:

> "Any specific finding of the Board under this paragraph shall not be reviewed or redetermined *by any court or agency* other than by the Tax Court of the United States in a proceeding for a redetermination of the amount of excessive profits determined by an order of the Board." (Emphasis added).

If the Congress had intended that § 108, which repeated the language of § 403 (e)(1) of the earlier Act, precluded *all* review of *Tax Court decisions* under the 1951 Act, and not merely its factual *determinations of the amount of excessive profits*, it would have been superfluous to provide that *determinations of the Board* on preliminary questions

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Corporation Price Adjustment Board, 177 F. 2d 727, certiorari denied, 339 U. S. 912; *King Construction Corporation* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U. S. 943. While the Ninth Circuit reached a contrary result in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, it indicated that the Tax Court's decisions could be collaterally attacked in the district courts.

under § 106, which in any case might not result in the determination of any amount of excessive profits, should not be subject to review or redetermination by *any court or agency* (*except the Tax Court*, in one instance). Thus, it appears evident that when the Congress intended to preclude review of a given determination or finding of the Board or the Tax Court, it specifically stated its intent.

II.

An Aggrieved Contractor, Who Asserts That the Tax Court, in Making a Determination of Excessive Profits, Exceeded Its Authority Under the Renegotiation Act, Is Entitled, Under the Constitution and Decisions of This Court, to Judicial Review.

A construction of § 403 (e)(1) of the Renegotiation Act which would prohibit judicial review of the statutory basis for a determination of excessive profits by the Tax Court would, in the case of an aggrieved contractor, violate the Constitution or, at least, present a serious constitutional question and should be avoided. "'Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution'. . . . A condition should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the act." *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 491-492.

Article III, Section 1, of the Constitution vests the judicial power in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish". Numerous opinions of this Court have reiterated that the determination of the statutory basis of an administrative agency's action is a judicial function. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *Stark* v. *Wickard*, 321 U. S. 288, 309-310; *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 144-145. The Tax Court is an administrative agency. 26 U. S. C. 7441, 7443(e) (formerly 1100, 1102(e)); *Old Colony Trust Company* v. *Commissioner*, 279 U. S. 716; *Lichter* v. *United States*, 334 U. S. 742, 791-792.

When a contractor believes that there is no basis in the Renegotiation Act for an order of the Tax Court determining excessive profits, the due process clause of the Fifth Amendment immediately becomes relevant. The landmark case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, established that in such a situation "the courts . . . must have power in a proper proceeding to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." 187 U. S. at pp. 109-110. See also *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619-620; *International Railway Co.* v. *Davidson*, 257 U. S. 506.

If necessary for the proper functioning of the government, the judicial inquiry may be postponed by statute until after a collection of funds or a taking of property by an administrative agency, provided that "the opportunity given for the ultimate judicial determination of the liability is adequate". *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 596-597.

Early emphasis upon this right to ultimate judicial inquiry is found in *Cary* v. *Curtis*, 3 How. (U. S.) 236, where the question was whether a statute requiring collectors of customs to pay to the Treasurer of the United States all moneys received barred a suit against a collector for customs duties illegally exacted. The majority of the court concluded that other means of judicial redress were available and decided that the action against the collector was barred. Mr. Justice Story, who believed that no other judicial remedy existed, dissented, saying in part,

> "* * * it never could be the intention of Congress to pass any statute by which the courts of the United States, as well as the State courts, should be excluded from all judicial power in the interpretation of the revenue laws, and that it should be exclusively confided to an executive functionary finally to interpret and execute them—a power which must press severely

upon the citizens, however discreetly exercised, and which deeply involves their constitutional rights, privileges, and liberties." 3 How. at p. 257.

The majority's emphasis upon the availability of other judicial remedies *Id.*, 250 evidenced its adherence to the principle enunciated by Mr. Justice Story.

Subsequent cases have been decided on the assumption that judicial relief was required by the Constitution. For example, in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, had the taxpayer not been entitled, under the Constitution, to judicial relief there would have been no occasion to determine that the administrative procedure coupled with judicial review constituted an adequate remedy. See also *Central of Georgia R. Co.* v. *Wright*, 207 U. S. 127, involving the Fourteenth Amendment. *Cities Service Company* v. *McGrath*, 342 U. S. 330, is a recent illustration of this Court's vigilance to assure judicial relief against a collection of funds by an administrative officer of the government, which might later prove to have been without adequate safeguard to the payor.

In upholding the constitutionality of other World War II legislation, this Court has uniformly found that ultimate judicial review was specifically provided or otherwise available. *Estep* v. *United States*, 327 U. S. 114; *Bowles* v. *Willingham*, 321 U. S. 503, 521; *Yakus* v. *United States*, 321 U. S. 414, 442, 444. Cf. *Cities Service Company* v. *McGrath*, 342 U. S. 330. The denial of judicial review under the Renegotiation Act would appear to be without precedent in analogous cases decided by this Court.[23]

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[23] Certain cases in which no constitutional requirement of judicial review has been found are distinguishable because they involved grants, benefits, special relief or "rights", which were matters of legislative grace. *E.g., United States* v. *Williams*, 278 U. S. 255 (veterans benefits); *Henrietta First Moon* v. *Starling White Tail*, 270 U. S. 243 (land grants to Indians); *Work* v. *U. S. ex. rel. Rives*, 267 U. S. 175 (Dent Act relief for World War I contractors); *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (collective bargaining rights under Railway Labor Act).

The District of Columbia Court of Appeals is a proper forum for the judicial review of Tax Court decisions under the Renegotiation Act. § 7482 (formerly § 1141) of the Internal Revenue Code. See also § 3 (e) of the Renegotiation Act of 1948, 50 U. S. C. App. 1193 (e).[24]

The District of Columbia Court has repeatedly held that it has jurisdiction to review Tax Court decisions under the Renegotiation Act on constitutional and jurisdictional questions. *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405; *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, certiorari denied, 343 U. S. 967; *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U. S. 912; *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U. S. 943. Its refusal to review in the instant case is based upon an artificial distinction between jurisdiction and "coverage". The Court based its finding of such a distinction upon the decision of this Court in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, despite its recognition that the *Waterman* case turned upon the failure of the contractor to exhaust its administrative remedies and the fact that the question of judicial review was specifically reserved by this Court. See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 755, 771. Unless there

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[24] The suggestion of the Ninth Circuit in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, 565, that Tax Court determinations may be collaterally attacked in District Court suits brought by the Government to collect excessive profits, overlooks the fact that § 403 (e)(1) of the Renegotiation Act provides that the filing of a petition for a redetermination by the Tax Court shall not operate to stay the execution of the order of the Board. Thus a District Court suit might be brought and heard before a contractor could exhaust his administrative remedy in the Tax Court, and the contractor would thus be precluded from collateral attack. Also, if the Government withholds the claimed amount of excessive profits from amounts due the contractor, there is no District Court suit by the Government in which a collateral attack can be made.

is a contract with a "Department" or a subcontract as defined in the Act, the Act has no application and the renegotiation agencies have no statutory power to make any determination of excessive profits. Thus the question whether a particular contract is a contract or subcontract as defined in the Act is jurisdictional in the most fundamental sense.[25]

III.

The Petitioner Is Entitled to Review in the United States Court of Appeals for the District of Columbia Circuit of a Decision of the Tax Court That a Specific Contract Is Not a Contract or Subcontract Defined in the Renegotiation Act.

It is axiomatic that a decision of the Tax Court as to the statutory limits of the revenue laws presents a case or controversy subject to judicial determination, and that in such a case the Commissioner of Internal Revenue, as well as the taxpayer, may have judicial review in a Court of Appeals under § 7482 (formerly § 1141) of the Internal Revenue Code. See *Commissioner of Internal Revenue* v. *Liberty Bank & Trust Co.*, 59 F. 2d 320 (C. C. A. 6).

Section 7482 is not by its terms limited to cases arising under the revenue laws and jurisdiction of the United States Court of Appeals for the District of Columbia Circuit to review decisions of the Tax Court under the Renegotiation Act is invoked under that section. As demonstrated herein, review of a decision of the Tax Court that a specific contract is, or is not, a contract or subcontract defined in the Renegotiation Act is not precluded by § 403 (e)(1).

The nature and purpose of the Renegotiation Act, and the responsibility placed upon the renegotiating agencies

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[25] If a Selective Service Board had ordered the induction of a man eighty years old or a woman, after an exhaustion of administrative remedies, judicial relief would undoubtedly have been available. *Estep* v. *United States*, 327 U. S. 114. From a juridictional point of view, a similar situation is presented when the Tax Court determines excessive profits under a contract which is neither a contract or subcontract defined in the Renegotiation Act.

for the recapture of excessive profits, evidence the intent of Congress that such review may be invoked by a renegotiating agency, as well as a contractor. The position of the renegotiating agency is analogous to that of the Commissioner in a case arising under the revenue laws. See *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 431; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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APPENDIX A.

The Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U. S. C. App. 1191), provides in pertinent part:

> Sec. 403 (a). For the purpose of this section—
>
> (1) The term "Department" means the Department of the Army, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.
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> (3) The terms "renegotiate" and "renegotiation" include a determination by agreement or order under this section of the amount of any excessive profits.
>
> (4) (A) The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. . . .
>
> (5) The term "subcontract" means—
>
> (A) Any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract, but such term does not include any purchase order or agreement to furnish office supplies; or
>
> (B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (ii) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts: . . .
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Sec. 403 (c) * * *

(1) . . . If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. . . .

* * * * *

(4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

* * * * *

Sec. 403 (e)

(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received

or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c)(2).

* * * * *

Section 403 (h)

This section shall apply only with respect to profits derived from contracts with the Departments and subcontracts which are determined under regulations prescribed by the Board to be reasonably allocable to performance prior to the close of the termination date. Notwithstanding the method of accounting employed by the contractor in keeping his books, profits determined to be so allocable shall be considered as having been received or accrued not later than the termination date. For the purposes of this subsection, the term "termination date" means whichever of the following dates first occurs—

(1) December 31, 1945; or

(2) the date proclaimed by the President as the date of the termination of hostilities in the present war; or

(3) the date specified in a concurrent resolution of the two Houses of Congress as the date of the termination of hostilities in the present war.

The Internal Revenue Code of 1954, as amended (Public Law 591, 83d Cong., 2d Sess., Title 26 U. S. C.), provides in pertinent part:

Sec. 7482. Courts of review

(a) Jurisdiction.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

(b) Venue.—

(1) In general.—Except as provided in paragraph (2), such decisions may be reviewed by the United States Court of Appeals for the circuit in which is located the office to which was made the return of the tax in respect of which the liability arises, or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

Section 7482 (a) and section 7482 (b)(1) contain substantially the same language as section 1141 (a) and section 1141 (b)(1), respectively, of the Internal Revenue Code of 1939, as amended.

APPENDIX B.

Analysis of the Method of Determining the Amount of Excessive Profits.

Consideration of the question presented in this case is facilitated by a cognizance of the steps involved in a renegotiation. The steps are essentially these:

1. The determination of the amount of the contractor's receipts or accruals subject to renegotiation. The Act authorized renegotiation of contracts with certain named departments and agencies and subcontracts thereunder. It also contained exemptions of certain categories of receipts or accruals and authorized the granting of additional exemptions in specified situations. It is thus necessary that a complete examination be made of a contractor's sales in order to segregate its receipts or accruals into renegotiable and non-renegotiable business.

2. The determination of the expenses attributable to the renegotiable receipts or accruals. Two questions must be considered here. It is first necessary to determine the expenses of the contractor allowable under the Renegotiation Act, which provides that expenses allowable for income tax purposes are also allowable for renegotiation. After determining the expenses of the contractor which are properly allowable, it is necessary to determine the portion of such allowable expenses applicable to renegotiable business. This determination requires an examination of the accounting techniques and principles applied in the business of the contractor. After these determinations have been made, the total of allowable expenses applicable to renegotiable business subtracted from the total renegotiable receipts or accruals determines the total profits on renegotiable business.

3. The development of factual data concerning the character of the contractor's business, its efficiency, its level of costs as compared with other producers, the amount of capital employed in renegotiable business, rates of profit

normal in the industry, the extent of risk assumed by the contractor in the performance of renegotiable business, and other facts which would indicate the level of profit that would be reasonable for the particular contractor.

4. The determination of the percentage, if any, of the contractor's profits on renegotiable business which constitutes excessive profits.

Renegotiation thus requires the resolution of various types of questions. In the initial segregation of sales stage, the questions may be purely factual, involving only segregation of receipts concededly covered by the Act. On the other hand, a basic question of law may be confronted at the outset. It may be necessary to decide whether a particular contract, the facts relating to which are not in dispute, is subject to renegotiation. Where only one contract is involved in the renegotiation, unless it is a contract or subcontract defined in the Act, the renegotiating agency has no statutory authority to determine any amount as excessive profits.

The second stage of determining the expenses allowable and allocable to renegotiable business is principally concerned with accounting questions, although the statutory requirement of allowing expenses allowable for income tax purposes may give rise to certain legal questions.

Once the amount of profits subject to renegotiation is determined, the remainder of the process is essentially subjective in nature. If the facts relating to the statutory factors to be considered by the renegotiating agency are not in dispute, its determination of the amount, if any, of excessive profits is wholly a matter of judgment.